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No.

In the Supreme Court of the United States

October Term, 1980

MISSISSIPPI POWER & LIGHT COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

The narrow issue is the validity of a regulation (41 C.F.R. §60-1.4(e)) which unilaterally incorporates Executive Order 11246 into government contracts regardless of consent. That regulation is challenged here on grounds that (1) there is not a sufficient nexus between the regulation and any authorizing statute and (2) the regulation violates the Fifth Amendment's prohibition against impairing the obligation of a contract.

Assuming that the regulation is valid, the broader question is the validity of Executive Order 11246 in general and its enforcement provisions in particular. The Executive Order is challenged on grounds that there is no nexus between it and any enabling legislation. The enforcement provisions, i.e., searches of books and records, suits to enjoin violations, and the imposition of sanctions and penalties, are challenged on grounds that (1) they are not authorized by Congress and (2) the separation of powers doctrine as well as the Administrative Procedure Act prohibit the Executive branch from creating enforcement powers.

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OPINIONS BELOW

The chronological order of the opinions below is as follows. The district court's original opinion is unofficially reported at 10 F.E.P. 1084 (S.D. Miss. 1975). The court of appeals' first opinion is reported at 553 F.2d 480 (5th Cir. 1977). The court of appeals' first decision in the companion case, *United States v. New Orleans Public Service, Inc. (NOPSI)*, is reported at 553 F.2d 459 (5th Cir. 1977). This Court's granting of the Petitions for Writs of Certiorari in both cases is reported at 436 U.S. 942 (1978). The court of appeals' order remanding both cases to the respective

district courts is reported at 577 F.2d 1030 (5th Cir. 1978). The district court's decision on remand in this case is unofficially reported at 20 F.E.P. 47 (S.D. Miss. 1979) (Appendix A). The subsequent decision of the court of appeals is reported at 638 F.2d 899 (5th Cir. 1981) (Appendix B).

JURISDICTION

The judgment of the court of appeals was entered on March 6, 1981 (Appendix C). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, EXECUTIVE ORDERS AND REGULATIONS INVOLVED

U.S. Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or liimb; nor shall be compelled in any criminal case to be a witness against

himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Executive Order 11246 (See Appendix D):

30 Fed. Reg. 12319 (1965), 3 C.F.R. 339 (1964-65 Compilation), as amended by Exec. Order No. 11375, 32 Fed. Reg. 14303 (1967), 3 C.F.R. 406 (1969), 42 U.S.C.A. §2000e note (1974), superseded in part (irrelevant for purposes herein) by Exec. Order No. 11478, 34 Fed. Reg. 12985 (1969), 3 C.F.R. 133 (1969 Compilation), 42 U.S.C.A. §2000e note (1974)

Pertinent regulations of the Secretary of Labor implementing Executive Order 11246, reprinted in full in Appendix E, to-wit:

41 C.F.R. §60-1.4(e), *Incorporation by operation of the Order.* By operation of the Order, the equal opportunity clause shall be considered to be a part of every contract and subcontract required by the Order and the regulations in this part to include such a clause whether or not it is physically incorporated in such contracts and whether or not the contract between the agency and the contractor is written.

41 C.F.R. §60-1.43, *Access to records of employment.* Each prime contractor and subcontractor shall permit access during normal business hours to its premises for the purpose of conducting on-site compliance reviews and inspecting and copying such books, records, accounts, and other material as may be relevant to the matter under investigation and pertinent to compliance with the order and the rules and regulations pursuant thereto by the agency, or the Director. Information obtained in this matter shall be used only

in connection with the administration of the Order, the administration of the Civil Rights Act of 1964 (as amended) and in furtherance of the purposes of the Order and that Act.

The pertinent provisions of the Federal Property and Administrative Services Act of 1949, 63 Stat. 378, 40 U.S.C. §471 *et seq.*, reprinted in Appendix F.

STATEMENT OF THE CASE

1. Background Facts

For many years, the petitioner, Mississippi Power & Light Company (MP&L), a public utility, has furnished electrical services to various facilities operated by the General Services Administration (GSA) under written and unwritten agreements. On March 28, 1972, the GSA attempted to schedule an on-site compliance review of MP&L's compliance with Executive Order 11246. This Executive Order requires all government agencies to include in every government procurement contract a prescribed 600 word contractual stipulation commonly called the equal opportunity clause. This clause obligates the contractor as a part of its contract *inter alia* not to discriminate on the basis of race, color, religion, national origin or sex and to obey all implementing regulations of the Secretary of Labor. MP&L advised the GSA that it was not bound by the Executive Order because none of its GSA contracts contained the equal opportunity clause. The GSA then referred this matter to the Justice Department.

2. Original Proceedings in the District Court

On August 8, 1974, the Justice Department filed this suit to "enforce the contractual obligations imposed by Executive Order 11246." Complaint ¶1. The government's

alleged basis of jurisdiction is 28 U.S.C. §1345 which gives "the District Courts . . . original jurisdiction of all civil actions . . . commenced by the United States." The complaint alleges that MP&L is a government contractor and is therefore bound by Executive Order 11246. In its answer, MP&L challenged the validity of the Executive Order in general and as applied to a non-consenting contractor. On April 22, 1975, the district court granted the government's motion for partial summary judgment and enjoined MP&L from refusing to comply with the Executive Order and all applicable rules and regulations. In view of the constitutional issues involved, the district court granted MP&L's motion for a stay of the injunction pending appeal.

3. Original Proceedings in the Court of Appeals

MP&L's appeal was consolidated for oral argument with *United States v. New Orleans Public Service, Inc.* (*NOPSI*) which has similar facts and legal issues. While companion opinions were written, the *NOPSI* opinion effectively disposed of both cases. The court of appeals affirmed the district courts' decisions that the utilities were bound by Executive Order but vacated the injunctions and remanded the case to the GSA for administrative enforcement proceedings. The court explained that it preferred "that the government . . . now obtain the company's voluntary compliance before calling for the support of our injunctive powers." *United States v. NOPSI*, 553 F.2d 459, 474 (5th Cir. 1977) (Judge Clark dissenting). See also *United States v. Mississippi Power & Light Co.*, 553 F.2d 480 (5th Cir. 1977) (Judge Clark, dissenting).

4. Original Actions by Supreme Court

The utilities filed Petitions for Writs of Certiorari, which this Court granted with the following order:

> Petition for Writ of Certiorari granted, judgment vacated and case remanded to the court of appeals for further consideration in light of *Marshall v. Barlow's*, 436 U.S. 307 (1978).

436 U.S. 942 (1978). The court of appeals subsequently "vacated [the judgment of the district court] and . . . remanded [to the respective district courts] for consideration in light of the Supreme Court's order." 577 F.2d 1030 (5th Cir. 1978).

5. Proceedings in the District Court on Remand

On May 30, 1979, the district court heard oral arguments on respective motions for summary judgment. MP&L argued that the entire judgment of the court of appeals had been vacated and therefore all issues could be reargued. The government contended, and the district court agreed, that reconsideration was limited to the Fourth Amendment because *Marshall v. Barlow's* was a Fourth Amendment case. The district court then held that the Fourth Amendment was not applicable because MP&L had consented to the searches by doing business with the federal government. 20 F.E.P. 47 (S.D. Miss. 1979). See Appendix B. MP&L appealed.

6. Second Appeal to the Court of Appeals

On appeal, the *MP&L* and *NOPSI* cases were again consolidated for oral argument on October 6, 1980. In view of this Court's intervening decision in *Chrysler Corp. v.*

Brown, 441 U.S. 281 (1979),[1] the panel asked both sides to submit additional briefs on the following question: If there is no enabling legislation for the Executive Order, can the Executive Order be upheld based on the President's inherent constitutional authority.

On March 6, 1981, the court of appeals issued a consolidated opinion holding that it need not make the nexus inquiry articulated by this Court in *Chrysler* nor decide whether the Executive Order was within the President's inherent authority. The court of appeals rationalized that since this Court in *Chrysler* did not reach the question of whether the Executive Order was authorized by statute, it thereby indicated "a willingness to accept the validity of the executive order. [The court of appeals therefore held] fast to [its] previous determination that E.O. 11246 was a proper exercise of congressionally delegated authority." 638 F.2d at 905.

The court of appeals also upheld a challenged Department of Labor regulation which incorporated the equal opportunity clause into MP&L's contracts "by operation of the order" See 41 C.F.R. §60-1.4(e). The court held that the regulation "is an evocation of the strict policy that the affirmative action obligation is an understood and unalterable part of doing business with the federal government." *Id.*

The court of appeals disagreed with the district court's holding that MP&L waived its Fourth Amendment rights

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1. This court's original remand of this case did not specifically direct any reconsideration of the validity of the Executive Order. However, whatever the original scope of review on remand was, it was changed by this Court's subsequent decision in *Chrysler*. "Lower courts are bound to consider any change either in fact or in law which has supervened since the original judgment was entered." *Baird v. Benton County Board of Education*, 421 F.2d 700, 701 (5th Cir. 1970); *Bell v. State of Maryland*, 378 U.S. 226 (1964).

by doing business with the federal government. Nevertheless, the court of appeals held (1) that the Fourth Amendment does not necessarily require a warrant if the enforcement procedures contained in the relevant regulations provide equivalent safeguards, and (2) that the constitution does require that the search be authorized by statute, be limited in scope and initiated by neutral criteria. The court of appeals asserted that the first and second issues were questions of law which it could decide. The court proceeded to hold that the search was limited in scope and that "the inspections sought here are clearly within . . . statutory authority." *Id.* at 908. The court then remanded the case to the district court to conduct an evidentiary hearing on the third criteria of whether the search was initiated pursuant to an administrative plan containing neutral criteria.

WHY THE PETITION SHOULD BE GRANTED

I. THE VALIDITY OF THE EXECUTIVE ORDER

A. Statutory Authority in General

This case raises the question that this Court left open in *Chrysler Corp. v. Brown.*

> [W]hether Executive Order 11246 . . . is authorized by the Federal Property and Administrative Services Act of 1949, . . . the Civil Rights Act of 1964, the Equal Employment Opportunity Act of 1972, or some more general notion that the Executive can impose reasonable contractual requirements in the exercise of its procurement authority.

441 U.S. at 305. This Court articulated the test of validity.

> [I]n order for [the Executive Order] to have the "force and effect of law," it is necessary to establish a nexus between the [Executive Order] and some

> delegation of the requisite legislative authority by Congress. * * * The pertinent inquiry is whether under any of the arguable *statutory* grants of authority the [Executive Order] is within the contemplation of that grant of authority.

441 U.S. at 304, 306.

While this Court did not reach that question, it did make a cursory inquiry. "The origins of the congressional authority for Executive Order 11246 are somewhat obscure and . . . [are not] clearly identifiable." *Id.* at 304, 307. This Court went on to reject a 15 year line of cases which had upheld the validity of the predecessor of Executive Order 11246. Those cases held that the Executive Order was authorized by §486(a) of the Federal Property and Administrative Services Act (See Appendix F, §205(a)). This Court relegated those decisions to "suggestions" and "dicta" because the lower courts had failed to make any "analysis of the nexus between the . . . Act and the Executive Orders." *Id.* at 405 n.34.

In its first opinion, the court of appeals made the same error of failing to make any nexus analysis.

> The starting point of our analysis is the well established proposition that the Order has the force and effect of law.
>
> * * *
>
> This circuit has held that Executive Order 10925, the predecessor of No. 11246, was issued pursuant to statutory authority because of the relationship between the antidiscrimination provision in the Order and the purposes of . . . §486(a) [of the FPASA], the statute governing, *inter alia*, government procurement.

United States v. NOPSI, 553 F.2d at 465. The court of appeals relied on *Farkus v. Texas Instruments*, 375 F.2d 629 (5th Cir. 1967), *cert. denied*, 389 U.S. 977 (1967) and *Farmer v. Philadelphia Electric Company*, 329 F.2d 3 (3rd Cir. 1964), the same cases this Court relegated to dicta for failing to make any nexus analysis. 441 U.S. at 405 n.34.

Chrysler clearly rendered the court of appeals first opinion to dicta. However, in its second decision, the court of appeals did not correct its original error. In again failing to make any nexus analysis, the court stated:

> *Chrysler* does not undermine our holding that E.O. 11246 is firmly rooted in congressionally delegated authority.
>
> * * *
>
> We thus hold fast to our previous determination that E.O. 11246 was a proper exercise of congressionally delegated authority.

638 F.2d at 905.

The court of appeals misread *Chrysler*. The court rationalized that it could "hold fast" to its previous determination because "the Supreme Court's refusal to [find the Executive Order was not valid] implies . . . a willingness to accept the validity of the executive order." *Id.* There is nothing in *Chrysler* to support the court of appeals' conclusion that this Court "accepted" the validity of the Executive Order.[2] Rather, this Court said that "[f]or pur-

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2. The court of appeals rationalized that:

To have found that E.O. 11246 was authorized by statute would have been pointless. Such a holding would not have aided the [Supreme] Court in deciding the pertinent question - whether there was enough of a nexus between the regulations at issue and the cited sources of authority to give those regulations the force and effect of law.

(Continued on following page)

poses of this case, it is not necessary to decide [that issue here]." 441 U.S. at 304. This Court's view that congressional authorization for the Executive Order is *obscure* and *not clearly identifiable* cannot be reconciled with the court of appeals' holding that congressional authorization is *deeply rooted*.

This Court should grant this petition to decide whether there is congressional authorization for Executive Order 11246. MP&L submits that there is simply no nexus between the Executive Order and the FPASA. Congress declared that the purpose of the FPASA, which created the GSA in 1949, was to consolidate the government's procurement function into a single agency with uniform procedures:

> It is the intent of the Congress in enacting this legislation to provide for the government an economical and efficient system for (a) the procurement and supply of personal property and nonpersonal services . . . (b) the utilization of available property; (c) the disposal of surplus property; and (d) records management.

40 U.S.C. §471.

> The Act explicitly authorizes Executive Orders "necessary to effectuate its provisions." §486(a). However, nowhere in the Act is there is specific reference to employment discrimination.

Chrysler at 304 n.34.

Footnote continued—

638 F.2d at 905. The court of appeals' statement that a nexus finding would not have been pointless is erroneous. Such a finding may have saved the regulations. "Were a grant of legislative authority as the basis for Executive Order 11246 more clearly identifiable, we might agree with the respondents that this compatibility gives the disclosure regulations the necessary legislative force." *Chrysler*, 441 U.S. at 307.

The validity of Executive Order 11246 is an important question because of its pervasive impact. Twenty-one thousand (21,000) entities including private companies, state and local governments and educational institutions are covered by the Executive Order and are thereby required as a condition of doing business with the government to agree as part of their contract not to discriminate and to take affirmative action to hire and promote females and minorities. The boiler plate language of the Executive Order contains over 600 words and is bolstered by almost 50,000 words of implementing regulations. See 41 C.F.R. §60 *et seq.*

In addition, the Executive Order is administered and enforced by the Office of Federal Contract Compliance. That office was not created by Congress but by the Secretary of Labor. Sec. of Labor's Order No. 26-65, 31 Fed. Reg. 6921 (1966). The OFCCP has the power to terminate government contracts and to debar companies from doing business with the government in the future. "As long ago as 1939, the government recognized that the penalty of blacklisting is so severe that its imposition may destroy a going business." Report of Attorney General's Committee on Administration Procedure in Government Agencies. S. Doc. No. 10, 77th Cong., 1st Sess., pt. 1 at 2-3 (1941). The threat of canceling a federal contract is so powerful that the OFCCP has used it to impose backpay penalties. "[B]etween 1969 and 1979, OFCCP entered into hundreds of backpay agreements involving well over $61,000,000." 44 Fed. Reg. 77000 (Dec. 28, 1979).

This court should decide whether the exercise of such pervasive regulatory control and awesome power over government contractors "is within the contemplation of [any] grant of [statutory] authority." *Chrysler,* 441 U.S. at 306.

B. Validity of Enforcement Provisions

Assuming *arguendo* that there is a nexus between the Executive Order and the FPASA, the Executive Order would generally have the force and effect of statutory law because §486(a) of the FPASA authorizes the President to write policies and directives to implement the Act. Even so, that general nexus would not extend to the enforcement provisions of the Executive Order and its implementing regulations. A general delegation of authority to write rules and regulations to implement a statute cannot constitutionally include the power to create enforcement provisions. While enforcement provisions can be administered by the Executive Branch, they must be created by the legislative branch.

Executive Order 11246 and its implementing regulations create at least three enforcement provisions: (1) search of private records and inspection of private property; (2) suits to enforce the Executive Order; and (3) sanctions and penalties.

1. Search of Records and Inspection of Property

The FPASA does not authorize a subpoena of records or an inspection of premises to investigate violations of the Act or implementing executive orders. However, the President and the Secretary of Labor have authorized their own searches. Section 202(5) of Executive Order 11246 provides that:

> The contractor . . . will permit access to his books, records, and accoun' by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations and orders.

The Secretary of Labor has also provided that:

> Each prime contractor and subcontractor shall permit access during normal business hours to its premises for the purpose of conducting on-site compliance reviews and inspecting and copying such books, records, accounts and other material as may be relevant to the matter under investigation.

41 C.F.R. §60-1.43. *This court has never been asked to sanction an administrative search not authorized by law.* Soon after Congress created the first regulatory agency, this Court considered the reasonableness of a subpoena issued by that agency. *Interstate Commerce Comm. v. Brimson,* 154 U.S. 447 (1894). In that case and in every succeeding case, the subpoena - the search - was authorized by Congress. See *United States v. Morton Salt Company,* 383 U.S. 632 (1950); *Oklahoma Press Publishing Company v. Walling,* 327 U.S. 186 (1946); *Hale v. Henkel,* 201 U.S. 43 (1906). Statutory authorization is a cornerstone of reasonableness under the Fourth Amendment.

> When an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose and specific in directive. . . . *The agency has the right to conduct all reasonable inspections of such documents which are contemplated by statute.*

See v. City of Seattle, 387 U.S. 541, 554 (1967) (emphasis added). While administrative inspection of private property is a newer investigative technique, statutory authorization is also constitutionally required.

> One governing principle justified by history and by current experience has consistently been followed: except in certain carefully defined classes of cases,

> a search of private property without proper consent is unreasonable unless it has been authorized by a valid search warrant.

Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967). Of course, "a warrant . . . would provide assurances . . . that the inspection . . . is authorized by statute." *Marshall v. Barlow's*, 436 U.S. at 323. "The legality of the search depends . . . on the authority of a valid statute." *United States v. Biswell*, 406 U.S. 311, 315 (1972).

The government claims the right to conduct both kinds of searches - a subpoena of MP&L's records and an inspection of MP&L's property without the benefit of a statute. Both violate constitutional and statutory law. The Administrative Procedure Act provides that "[p]rocess, . . . inspection or other investigative act or demand may not be issued, made or enforced except as authorized by law." 5 U.S.C. §555(c).

Even the court of appeals recognized the necessity for congressional authorization. "One element of the [Fourth Amendment] question is whether the proposed search is authorized by statute." 638 F.2d at 907. Having correctly recognized the constitutional standard, the court of appeals erroneously implied the existence of a statute:

> [The existence of a statute is a] question of law that we may decide on appeal. Our first opinions in these cases have already concluded that Executive Order 11246 and the regulations thereunder are statutorily authorized. . . . The inspections sought here are clearly within that statutory authority.

Id. at 908. The court of appeals failed to cite any statute for an ample reason - there is none. No provision of the FPASA or any other statute authorizes this search.

The court of appeals' reliance on its first opinion is ironic because that opinion candidly acknowledged the absence of statutory authorization. It nevertheless held that:

> The argument about lack of statutory authorization is without merit in light of the pattern of congressional approval for the executive order program.
>
> * * *
>
> The executive order and its implementing regulations . . . play the same validating role as a statute.

553 F.2d at 472 n.12, 471. While this Court has under very limited circumstances disposed of the necessity for a warrant,[3] *it has never disposed of the constitutional requirement for congressional authorization for the search itself.* The court of appeals eviscerated this constitutional guarantee by substituting tenuous and questionable implied congressional approval of a general program in lieu of specific authorization for the search itself. Such a holding allows the Executive branch and its agencies to authorize their own searches by simply writing a regulation. If that result is not reversed, the cornerstone of the reasonableness of an administrative search, i.e., congressional authorization, and the protection it affords, will become a constitutional relic.[4]

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3. *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970); *United States v. Biswell*, 406 U.S. 311 (1972).

4. This Court's original remand to reconsider in light of *Marshall v. Barlow's, supra*, was not altogether clear. *Barlow's* did not involve the Fourth Amendment issue raised here. *Barlow's* involved the question of whether an OSHA administrative search fell within the *Colonnade/Biswell* exception to the general rule that a warrantless search is unconstitutional. When MP&L filed its original Petition for a Writ of Certiorari, it advised this Court that *Barlow's* was then pending and pointed out its

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2. Suits to Enforce Compliance

While the FPASA does authorize the government to sue for fraud,[5] it does not authorize suits to enjoin violations of the Act or its implementing executive orders and/or regulations. However, the President has authorized such suits himself. Section 209(a)(2) of Executive Order 11246 provides that the Department of Justice shall bring "appropriate proceedings . . . to enforce [the executive order and implementing regulations] including the enjoining . . . of [persons who] seek to prevent . . . compliance with the . . . order." Expanding upon this remedy, the Secretary of Labor has authorized suits for injunctive relief and any other equitable relief including back pay.[6] This case raises an issue of first impression for this Court, i.e., can the Executive branch create jurisdiction in the federal courts by executive order or administrative regu-

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Footnote continued—

inapplicability. *Barlow's* "would not control here regardless of whether a warrant is eventually required because those inspections are specifically authorized by Congress." Petition for Writ of Certiorari, No. 77-605 at 26 n.19.

MP&L has never complained about the lack of a warrant - only the lack of statutory authorization. Since the OSHA search in *Barlow's* was authorized by Congress, that decision does not dispose of the issue raised here. The only part of *Barlow's* that MP&L considers dispositive of its issue is this Court's statement that one advantage of a warrant is that it "would provide assurances . . . that the inspection . . . is authorized by statute." 436 U.S. at 321.

5. §209 of the Act authorizes the government to file suits against persons who use fraud to obtain some benefit from a federal agency in connection with the procurement, transfer or disposition of property.

6. Implementing regulation 41 C.F.R. §60-1.26(e) provides:
[T]he Attorney General may bring a civil action in the appropriate district court of the United States requesting a temporary restraining order, preliminary or permanent injunction, and an order for such additional equitable relief including back pay, deemed necessary or appropriate to ensure the full enjoyment of the rights secured by the Order, or any of the above.

lations. MP&L submits that the complaint fails to state a claim upon which relief can be granted because this suit is neither authorized by any statute nor based on a common law theory.[7]

> Counsel make the . . . argument that regulations promulgated by the Secretary authorized him to bring this suit. . . . It is therefore claimed that jurisdiction exists in the district court. . . . We think this argument patently paralogistic. *A grant of rule making power is not authority to create federal jurisdiction. That authority lies solely with Congress.*

Marshall v. Gibson's Products, 584 F.2d 668, 677 (5th Cir. 1978) (emphasis added) .

The government alleges jurisdiction under 28 U.S.C. §1345 which provides that "the district court shall have original jurisdiction of all civil actions, suits, or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress." While that statute may give the Federal Courts technical jurisdiction over the parties, it does not give the government a claim upon which relief can be granted. In *United States v. Standard Oil Co.*, 332 U.S. 302 (1947), the government filed a tort action on a "loss of services" theory after a serviceman was injured by the defendant. The suit was not authorized by statute and was not based on any common law theory.

> Not often . . . is this court asked to create a new substantive legal liability without legislative aid and as

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7. Even though the issue of whether the government has stated the cause of action at least indirectly effects the Court's jurisdiction, neither the district court nor the court of appeals has ever addressed the issue during the seven years of this litigation.

> at the common law. This case of first impression here seeks such a result.
>
> * * *
>
> Here the United States is party plaintiff to the suit. And the United States has power at any time to create liability. The only question is which organ of the government is to make the determination that liability exists. That decision, for the reasons that we have stated, is in this instance, for the Congress, not for the courts. Until it acts to establish the liability, this Court and others should withhold the creative touch.

332 U.S. 301, 302, 316-17 (1947).

In order to bring itself within this Court's decisions that the government does not need statutory authorization to sue on a common law cause of action, e.g., breach of contract, fraud, trepass,[8] *Rex Trailer Co. v. United States*, 350 U.S. 148 (1956); *United States v. Cooper Corp.*, 312 U.S. 600 (1941) (Justice Black dissenting); *United States v. San Jacinto Tin Co.*, 125 U.S. 275 (1888), the government argued below that it is suing on a contractual theory. The government's characterization of this suit as one "to enforce the contractual obligations imposed by Executive Order 11246" (Complaint ¶1) is linguistic sophistry to circumvent the lack of jurisdiction.[9] This suit is not based

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8. This court has also allowed the government to sue without statutory authorization on an equitable theory. *In Re Debs*, 158 U.S. 564 (1895); *Morrison v. Work*, 226 U.S. 482 (1925). However, the government's complaint in those cases were based on a common law theory. "The basis of injunctive relief in the federal courts has already been irreparable harm and inadequacy of legal remedy." *Beacon Theaters v. Westover*, 359 U.S. 500, 507 (1959).

9. While the government has sued some contractors for violating the Executive Order, those contractors had agreed to the Executive Order as a part of their contract. See e.g., *United States v. Local 189, Papermakers and Paperworkers*, 282 F. Supp. 39 (E.D. La. 1968), *aff'd*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). The cause of action was one for common law breach of contract.

on any common law theory because the government does not allege that MP&L breached any agreement. The complaint alleges that MP&L refuses to comply with Executive Order 11246. None of MP&L's contracts with the government include Executive Order 11246. Parties impose contractual obligations upon themselves. Obligations imposed by an executive order upon an unconsenting party does not arise via contract.

The government's position is also inherently contradictory. To state a cause of action, the government alleges that it is suing to enforce a common law contract. However, for purposes of liability, the government argues, *infra*, that contract law is inapplicable and that MP&L is bound by the Executive Order by operation of law regardless of the lack of its consent.

3. Sanctions and Penalties

While §209 of the FPASA does authorize certain sanctions and penalties for fraud, the Act does not otherwise authorize sanctions and penalties against those who violate the Act or its implementing executive orders and/or regulations. However, Executive Order 11246 creates its own sanctions and penalties. Section 209(a) provides *inter alia* that government contractors can have their contracts terminated or can be debarred from future contracts for violating the Executive Order and/or implementing regulations.[10] In addition, the Secretary of Labor has conferred upon himself cease and desist authority.[11]

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10. While these remedies are provided for violations of other statutes governing government contracts, they were expressly created by Congress. See, 40 U.S.C.A. §§276a-1 and 2; 41 U.S.C.A. §§36 and 354.

11. The Secretary amended the regulations (42 Fed. Reg. 3454, Feb. 17, 1977) to provide that:

> [T]he compliance agency (with the prior approval of the Director), or OFCCP may institute an administrative en-

(Continued on following page)

> [I]t is for Congress to prescribe the penalties for the laws which it writes. It would transcend both the judicial and the administrative function to make additions to those which Congress has placed behind the statute.

Steuart and Brothers, Inc. v. Bowles, 322 U.S. 398, 404 (1944); see also *United States v. Hark*, 320 U.S. 531 (1944); *United States v. Grimaud*, 220 U.S. 506 (1911). "Laws entail sanctions - penalties for their violation. * * * A determination that sanctions should be applied . . . is an exercise of legislative power." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 630 (1952) (Justice Douglas, concurring).

The creation of enforcement powers by Executive Order also violates statutory law. The Administrative Procedure Act provides that "a sanction may not be imposed . . . except within the jurisdiction delegated to the agency and as authorized by law." 5 U.S.C. §558(b).

The creation of these plenary powers by the Executive branch is unprecedented, fundamentally unconstitutional and totally alien to our system of administrative

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Footnote continued—

> forcement proceeding *to enjoin* the violations, to seek appropriate relief (which may include affected class and back pay relief), and to impose administrative sanctions, or any of the above.

41 C.F.R. §60-1.26(a)(2) (emphasis added).

> If it is determined after a hearing . . . that the contractor is violating the Order or regulations issued thereunder, the compliance agency . . . or the Secretary . . . shall issue an Administrative Order *enjoining* the violations and requiring the contractor to provide whatever remedies are appropriate, and imposing whatever sanctions are appropriate, or any of the above.

41 C.F.R. §60-1.26(d) (emphasis added).

law.[12] The separation of powers doctrine prohibits the Executive branch from creating penalties and sanctions for violations of law.

II. THE VALIDITY OF 41 C.F.R. §60-1.4(e) WHICH UNILATERALLY IMPOSES THE EXECUTIVE ORDER ON NONCONSENTING CONTRACTORS

Even if the Executive Order is valid in general, the regulation which unilaterally imposes the Executive Order on an unconsenting contractor like MP&L is unconstitutional. MP&L's contracts with the government make no reference to the Executive Order. However, the challenged regulation[13] provides that the Executive Order's 600 word contractual stipulation and the 48,000 words of implementing regulations "shall be considered to be a part of every contract . . . whether or not, it is physically included in such contract." 41 C.F.R. §60-1.4(e).[14]

The court of appeals upheld this regulation.

> The regulation is an evocation of the strict policy that the affirmative action obligation is an understood and

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12. While the government has not attempted to terminate its contract with MP&L, this sanction is discussed here to illustrate the arsenal of enforcement provisions not authorized by Congress.

13. Courts are rarely called upon to define the parameters of executive power. While the validity of Executive Order 11246 is an important question, "clashes between different branches of the government should be avoided if a legal ground of less explosive potentialities is properly available." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). A lesser ground is present here. Should this court grant this petition and hold that the regulation which incorporates the equal opportunity clause into MP&L's contracts is invalid, there would be no need to reach the broader questions.

14. This regulation has been slightly reworded and renumbered to 41 C.F.R. §60-1.47 as a part of other revisions to OFCCP rules. See 45 Fed. Reg. 86216 (Dec. 30, 1980). However, the effective date of the revised rules has been stayed pending further review by the current administration. 46 Fed. Reg. 9950 (Jan. 30, 1981).

> unalterable part of doing business with the government. If the government has the power to impose the affirmative action obligation at all, it must certainly have the power to impose it without exception.

638 F.2d at 905-06. With this sweeping language, the court of appeals again failed to make the required nexus analysis and avoided MP&L's arguments that (1) the incorporation regulation violates the Fifth Amendment by impairing the obligation of a government contract and (2) the Secretary of Labor exceeded his authority in writing a regulation which alters the terms of a government contract.

A. The Nexus Analysis

Chrysler held that:

> [I]n order for [disclosure] regulations [promulgated under Executive Order 11246] to have the "force and effect of law," it is necessary to establish a nexus between the regulations and some delegation of the requisite legislative authority by Congress.

441 U.S. at 304-05. The court of appeals did not make the required nexus analysis.

> *Chrysler* establishes two prerequisites for a regulation to have the force and effect of law. The promulgation of the regulation . . . must be within the contemplation of some congressionally delegated authority. . . . Our analysis turns then to whether the regulation is contemplated by the sources of congressional authority we cite for it. That analysis begins with the conclusion we have already reached: *Chrysler* does not undermine our holding that E.O. 11246 is itself firmly rooted in congressionally delegated authority. From there it is but a short step to the conclusion that the regulation is also within the contemplation of that grant of authority.

638 F.2d at 905. As argued, *supra*, there is no nexus between the Executive Order and the FPASA. Therefore, if the Executive Branch has no statutory authority to promulgate orders dealing with employment discrimination, a fortiori, it cannot unilaterally amend contracts to impose nondiscrimination covenants on unconsenting contractors. The "incorporation" regulation is just as remote to the FPASA as were the disclosure regulations in *Chrysler*.

> We think that it is clear that when it enacted these statutes, Congress was not concerned with public disclosure of trade secrets or confidential business information, and, . . . it is simply not possible to find in these statutes a delegation of the disclosure authority asserted by the respondents here.

Chrysler, 441 U.S. 306.

The court of appeals' decision also conflicts with the decision of the Fourth Circuit in *Liberty Mutual Insurance Co. v. Friedman*, ... F.2d ....., 24 F.E.P. 1168 (4th Cir. 1981). Liberty Mutual wrote Workmen's Compensation insurance for various government contractors. The insurance contracts made no reference to the Executive Order. Nevertheless, the district court held that those contracts made Liberty Mutual a subcontractor and subject to the Executive Order by virtue of the "incorporation" regulation. *Liberty Mutual v. Friedman*, ... F. Supp. ....., 21 F.E.P. 1016, 1021 (D. Md. 1979).

The Fourth Circuit reversed by using the *Chrysler* nexus analysis to reject the unilateral imposition of the Executive Order to an unconsenting party. "The connection between the cost of workers' compensation policies . . . and [the purpose of the FPASA] is simply too attentuated to allow a reviewing court to find the requisite con-

nection between procurement costs and social objectives." To highlight the conflict in the circuits, the Fourth Circuit characterized the Fifth Circuit's original opinion in this case "as the most extreme view . . . [with which the Fourth Circuit] simply disagreed." *Id.*

B. Impairment of Government Contracts

Not only does the "incorporation" lack any attributes of a substantive rule that has the force and effect of statutory law, it is also outright invalid for other reasons. The regulation is unconstitutional because it unilaterally alters the substantive terms of MP&L's contract with the government thereby violating MP&L's Fifth Amendment rights. MP&L's obligations under the "four corners" of its contracts with the government are fixed as a matter of contract law and constitutional law. "Rights against the United States arising out of contract with it are protected by the Fifth Amendment." *Lynch v. United States*, 292 U.S. 571, 579 (1934). Legislation [or regulations] which . . . add new duties or obligations [to a contract] necessarily impairs the obligations of the contract." *Northern Pacific R. R. Co. v. Minnesota*, 208 U.S. 583, 591 (1908). Since the challenged regulation imposes additional contractual obligations on MP&L, it impairs the obligation of the contract. It is hard to imagine a more egregious impairment than a regulation that unilaterally imposes on a party a term to which it has not agreed.

The court of appeals' statement that "the government has the power to impose the affirmative action obligation . . . without exception" shows a fundamental misconception of the capacity in which the government appears in this suit. The Fifth Amendment prohibits the Federal Government from exercising sovereign powers when it contracts.

> The two characters which the government possesses as a contractor and as a sovereign cannot be thus fused . . . Whatever acts the government may do, be they legislative or executive . . . cannot be deemed specifically to alter, modify, obstruct or violate the particular contracts to which it enters with private persons.

Horowitz v. United States, 267 U.S. 459, 461 (1925).

> The truth is, states and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons.

United States Trust Co. v. New Jersey, 431 U.S. 1, 25 n.23 (1977).

The distinction between the government's contracting and sovereign capacities is not simply theory. The distinction was created by the Fifth Amendment.

> There is a clear distinction between the power of Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements.

United States Trust Co. v. New Jersey, 431 U.S. 1, 26 n.25 (1977). Therefore, acting in its contracting capacity, the government has no power to "impose" anything, but only the power to enforce compliance with an agreement.

The court of appeals view that the regulation is lawful because the Executive Order "is an understood and unalterable part of doing business with the government,"

638 F.2d at 905, has absolutely no foundation in contract law or constitutional law. This Court has held many times that when the government contracts for goods and services, it is bound by the same rules as its citizens. *Reading Steel Casting Co. v. United States*, 268 U.S. 186 (1925); *Priebe & Sons v. United States*, 332 U.S. 407 (1947). Even that rule works in the government's favor in most cases. As a contractor, the government, like any businessperson, can use its economic leverage to get desired provisions as a condition of getting government business.

> Like private individuals and businesses, the Government enjoys the unrestricted power . . . to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.

Perkins v. Lukens Steel Co., 310 U.S. 113, 127 (1940).

With its tremendous economic leverage, the government has successfully been able to get most contractors to agree to the Executive Order. The Government did not get such an agreement from MP&L. Having made an agreement, the government cannot now invoke its sovereign power to impose contractual terms it was unable to get at the bargaining table.

C. Abrogation of Common Law

Even if the regulation passes constitutional muster under the Fifth Amendment, it is still invalid because a regulation can only implement a statute - it cannot make law. This regulation "makes law" because it changes the substantive terms of MP&L's contract. When the government contracts in the marketplace for goods and services, its "contract is to be construed and the rights of the parties are to be determined by the application of the same princi-

ples as if the contract were between individuals." *Reading Steel Casting Company v. United States,* 268 U.S. at 188. "It is customary where Congress has not adopted a different standard to apply to the construction of government contracts the principles of general contract law." *Priebe & Sons v. United States,* 332 U.S. at 411.

This regulation abrogates the common law principles otherwise applicable to MP&L's contract with the government. "The power of an administrative officer . . . to prescribe rules and regulations . . . is not the power to make law . . . but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation [which makes law] is a mere nullity." *Dixon v. United States,* 381 U.S. 68, 74 (1965).

CONCLUSION

Wherefore, premises considered, MP&L prays that this Court will grant this Petition.

Respectfully submitted,

SHERWOOD WISE
E. GRADY JOLLY
MICHAEL FARRELL
Counsel for Petitioner

APPENDIX

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

MISSISSIPPI POWER & LIGHT COMPANY,
Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,

v.

NEW ORLEANS PUBLIC SERVICE, INC.,
Defendant-Appellant.

Nos. 79-2636, 80-3043.

United States Court of Appeals,
Fifth Circuit.
Unit A

March 6, 1981.

Actions were brought to compel utilities' compliance with equal opportunity obligations of Executive Order 11246, which prohibits employment discrimination by government contractors. The United States District Courts for the Southern District of Mississippi and the Eastern District of Mississippi and the Eastern District of Louisiana granted injunctions. On appeal, the Court of Appeals, 553 F.2d 459 and 553 F.2d 480, modified and affirmed, and utilities petitioned for certiorari. The Supreme Court, 436 U.S. 942, 98 S.Ct. 2841, 56 L.Ed.2d 783, vacated and remanded. The Court of Appeals, 577 F.2d 1030, vacated judgments of the district courts and remanded causes with directions. On

remand, the United States District Courts for the Eastern District of Louisiana, Fred J. Cassibry, 480 F.Supp. 705, and for the Southern District of Mississippi, Dan M. Russell, Jr., J., entered orders similar to Court of Appeals' previous declaratory order, and utilities appealed. The Court of Appeals, Wisdom, Circuit Judge, held that: (1) orders issued by district courts were final appealable decisions; (2) Executive Order 11246 was a proper exercise of congressionally delegated authority; (3) a formal judicial warrant is not required for all administrative searches if enforcement procedures contained in relevant statutes and regulations provide safeguards roughly equal to those contained in traditional warrants, and (4) although Executive Order 11246 and regulations thereunder were statutorily authorized, and although searches were properly limited in scope, remand was necessary for factual determination as to how agency chose to initiate warrantless searches of utilities' records.

Vacated and remanded.

* * *

WISDOM, Circuit Judge:

These companion cases are before the Court for the second time. The Attorney General, on behalf of the United States, brought these actions in 1973 and 1974 against New Orleans Public Service, Inc. (NOPSI) and Mississippi Power & Light (MP&L), contending that, as government contractors, those companies were bound by Executive Order (E.O.) 11246, as amended, and the regulations of the Secretary of Labor promulgated under it, 41 C.F.R. § 60.1 *et seq.* That order imposes on government contractors the obligation to take affirmative action to achieve the equal opportunity goals of the E.O.'s mandate (in effect, to increase the hiring of members of racial and

ethnic minorities.)[1] More specifically, the United States sought injunctions to obtain access to the companies' records to determine whether they had complied with the mandates of the executive order. The companies resisted the inspection on a number of grounds which are detailed extensively in this Court's first opinions in these cases. *United States v. New Orleans Public Service, Inc.*, 5 Cir. 1977, 553 F.2d 459; *United States v. Mississippi Power & Light Co.*, 5 Cir. 1977, 553 F.2d 480. The primary challenges in those cases centered on the constitutional validity of the executive order and relevant regulations, on whether the mandates of the order could be imposed on the companies without their contractual consent, and on whether, and to what extent, the fourth amendment protected the companies' records from government view.

The district courts granted the injunctions. On appeal we held that the executive order and the regulations were congressionally authorized and therefore could validly be applied to the defendant companies. We also rejected the companies' fourth amendment arguments, but withheld the injunctive relief granted by the district courts. Instead, relying on the declaratory force of our decisions and the good faith of the parties, we allowed the companies to com-

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1. Section 202 of E.O. 11246, 3 C.F.R. 340 (1964-1965 Comp.), sets out a seven-point clause that must be included in most government contracts. Among other things, the clause provides: "The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, that employees are treated during employment, without regard to their race, creed, color, or national origin." The history of E.O. 11246 is described in detail in *United States v. New Orleans Public Service, Inc.*, 5 Cir. 1977, 553 F.2d 459. E.O. 11375, 3 C.F.R. 684 (1966-1970 Comp.), extended the requirements of E.O. 11246 to prohibit discrimination on the basis of sex. E.O. 12086, effective October 8, 1978, 3 C.S.R. 230 (1979), consolidated the entire contract compliance program in the Department of Labor.

ply voluntarily and authorized the government to seek through administrative proceedings to resolve any remaining issues concerning access to the companies' records.

The Supreme Court granted certiorari and vacated our decision for reconsideration in light of *Marshall v. Barlow's, Inc.*, 1978, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305, a decision subsequent to this Court's decision, which cast some shadows on the rationale underlying our resolution of the fourth amendment issues. 436 U.S. 942, 98 S.Ct. 2841, 56 L.Ed.2d 783. We in turn remanded the case to the respective district courts with the same directions. 577 F.2d 1030. Both courts concluded that *Barlow's* did not dictate a reversal of their earlier rulings and entered orders that were similar to the order issued by this Court before the Supreme Court's review. Because we disagree in part with the district courts, we must vacate their orders and remand for further findings.

I.

The United States raises an initial question, ignored by the appellants, whether the two orders issued by the district courts are final decisions within the meaning of 28 U.S.C. § 1291. If the decisions are not final, we do not have jurisdiction over these appeals.[2] Although the opinions and orders in these two cases differ somewhat, the effects of the two dispositions are the same. Both courts

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2. Aside from some specialized routes of appeal that are plainly not available here, *see* 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3901, at 397-98 (1976), the primary sources of appellate jurisdiction lie in 28 U.S.C. §§ 1291 and 1292. The only provision of § 1292 that might be applicable here is one providing for review of interlocutory orders granting or refusing injunctions. *See* 28 U.S.C. § 1292(a)(1). In *Liberty Mutual Ins. Co. v. Wetzel*, 1976, 424 U.S. 737, 96 S.Ct. 1202, 47 L.Ed.2d 435, however, the Supreme Court held that an order denying an injunction is not appealable under § 1292(a)(1) by the party who, like the companies here, opposed the injunction.

authorized the United States to proceed through administrative action to force the companies to comply with the executive order and the regulations. Both courts also concluded that the companies had no further fourth amendment defenses to the proposed inspections and that their refusal to allow the inspections violated the executive order. Neither court issued the injunctions sought by the government. Like this Court in its first decision, they were willing to rely instead on the declaratory force of their decisions and on the good faith of the parties. Both courts retained jurisdiction, however, in the event that enforcement of their decisions became necessary.[3]

[1] *Gillespie v. United States Steel Corp.*, 1964, 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199, furnishes the analytical framework for determining whether these orders are final within the meaning of § 1291. As that case points out, "a decision final within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case." *Id.* at 152, 85 S.Ct. at 310. Thus, although the withholding of injunctive relief and retention of jurisdiction by the district courts in these cases makes it possible that they will be called on to issue another order to enforce their decisions, that fact alone is not dispositive on the issue of finality. *Thoms v. Heffernan*, 2 Cir. 1973, 473 F.2d 478, *vacated on other grounds*, 1974, 418 U.S. 908, 94 S.Ct. 3199, 41 L.Ed.2d 1154.

[2] Rather, *Gillespie* dictates that we give the finality requirement a "practical rather than a technical construc-

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3. The orders issued by the district courts differed in one respect. The Court in No. 79-2636 also ordered that, within 90 days from the entry of the order, the government and MP & L were to seek through conciliation to resolve any remaining issues concerning the company's compliance with the executive order. Presumably, this additional provision was designed to fix a time limit after which the district court would enforce its decision by injunctive relief.

tion" and that the chief countervailing considerations are "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other". 379 U.S. at 152-53 (quoting *Cohen v. Beneficial Industrial Loan Corp.*, 1949, 337 U.S. 541, 546, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528 and *Dickinson v. Petroleum Conversion Corp.*, 1949, 38 U.S. 507, 511, 70 S.Ct. 322, 94 L.Ed. 299). With these considerations in mind, we conclude that the orders are sufficiently final to vest us with jurisdiction.

Our review of these orders does not raise the usual problems attending piecemeal review because it can be labelled "piecemeal" only in a distorted sense of the word. The orders would be undeniably final if the court had either granted or denied the injunctive relief asked for by the government instead of retaining jurisdiction to issue injunctions later if needed. The district courts otherwise fully decided every issue presented, including the two central issues before us now. These two substantive issues have formed the core of these cases from their inception, are the same issues we faced when the cases were first appealed to us, and are the same issues on which the Supreme Court granted certiorari before vacating our first judgment. These appeals are in effect a continuation of the first appeals. To resolve these issues now would impose no further inconvenience on the progress of this litigation. Indeed, refusal to decide these cases now would *create* cost and inconvenience without any benefit either to the parties or to the orderly administration of the appellate system. Should we refuse, the government will again seek to obtain the companies' records through administrative proceedings; the companies will again raise the two issues presented here; the government will apply to the district courts for an injunction; and, relying on their prior decisions, the courts will grant injunctions that will be clearly appealable under 28 U.S.C. § 1292(a)(1).

The issues would in no way be better suited for appellate review than they are now, but the parties will have suffered the cost and delay that would attend this unnecessary use of administrative and judicial resources. And, given the unusual procedural history of these appeals, we need not fear that our decision to hear these appeals will open the door to a host of other appeals that are truly "piecemeal".[4]

Liberty Mutual Insurance Co. v. Wetzel, 1976, 424 U.S. 737, 96 S.Ct. 1202, 47 L.Ed.2d 435, relied on heavily by the government, is inapposite. Appeal was denied there because the district court had issued a partial summary judgment, deciding for the plaintiffs only on the issue of liability but leaving open all issues concerning the relief sought. That is not the situation in these cases. The district courts decided every issue, including the appropriate relief.

II.

After the decisions in these cases were vacated and remanded to this Court, the Supreme Court issued its opinion in *Chrysler Corp. v. Brown*, 1979, 441 U.S. 281, 99 S.Ct.

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4. The unusual procedural history of these cases also distinguishes them from *Garza v. Smith*, 5 Cir. 1971, 450 F.2d 790. In that case, this court dismissed, for lack of finality, an appeal from a three-judge district court that granted declaratory relief but withheld injunctive relief, choosing instead to retain jurisdiction in the event that injunctive relief would later be necessary. The present cases come to us in a different posture, however, because they represent, in essence, rehearings of cases that were undisputedly appealable when we first considered them. Before those first appeals, the district courts had decided all the issues presented and had granted injunctive relief, making their decisions appealable under § 1291. (It is our own first decision in these cases, which withheld injunctive relief, that prompted the district courts to fashion their present orders in the manner that they did.) This protracted and convoluted procedural history is what pushes the two orders here across the not always bright line distinguishing final orders from interlocutory ones.

1705, 60 L.Ed 2d 208. The defendant companies argue that the case casts doubt on the statutory authorization we found for E.O. 11246 and that *Chrysler* therefore undermines our first decision.[5]

Chrysler Corporation brought suit against the Office of Federal Contract Compliance Programs (OFCCP), the agency charged with monitoring compliance with E.O. 11246. Chrysler sought an injunction to block that agency's public disclosure of information that the executive order had required Chrysler to furnish to the government. Chrysler argued, among other things, that public disclosure was barred by the Trade Secrets Act, 18 U.S.C. § 1905, which prohibits federal officials from releasing any information they receive in the course of their employment "in any manner not authorized by law". The OFCCP countered that certain of its regulations, promulgated under authority granted by E.O. 11246, had the force and effect of law and thus provided the necessary authorization to take the proposed disclosure outside the reach of the Trade Secrets Act. This argument in turn was premised on the validity of the executive order itself. The OFCCP found congressional authorization for E.O. 11246 in the Federal Procurement and Administrative Services Act,[6] the Civil Rights Act of 1964,[7] and the Equal Employment Opportunity

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5. The district courts did not address this issue. They were of the opinion that since the Supreme Court vacated for reconsideration in light of *Marshall v. Barlow's, Inc.*, and that since we remanded to them with those same directions, their review was limited to the effect *Barlow's* had on the prior decisions. Although we do go beyond the district courts' holdings and address questions other than those raised by the *Barlow's* decision, we go only so far as to explore the impact of *Chrysler v. Brown*. To the extent that the defendants have attempted to reopen issues unaffected by those two cases, we rest on our earlier decisions.

6. 40 U.S.C. §§ 471, *et seq.*

7. Pub.L. No. 88-352, 78 Stat. 241 (codified in scattered sections of 42 U.S.C.).

Act of 1972.[8] These were the same sources this Court relied on in reaching its first decision in these cases.

The Supreme Court held that the regulations did not have the force and effect of law. In so holding, however, the Supreme Court did not reach the issue whether E.O. 11246 was within the scope of the statutory grants of authority relied on by the OFCCP. Rather, the pertinent inquiry was whether the regulations themselves were within the contemplation of the statutory grants of authority. The Court concluded that they were not.

[3] We are unable to agree with the suggestion that the Supreme Court's failure to reach the question whether the executive order was within any grant of congressionally delegated authority impugns our earlier decision in these cases. To have found that E.O. 11246 was authorized by statute would have been pointless. Such a holding would not have aided the Court in deciding the pertinent question—whether there was enough of a nexus between the regulations at issue and the cited sources of authority to give those regulations the "force and effect of law". Thus, we can hardly draw any negative inference from the Court's failure to reach the issue of the validity of the executive order. Indeed, if any inference can be drawn, it could just as well be the opposite one. Had the Supreme Court held that the executive order was not valid, that would have sounded the death knell for the regulations promulgated under it. The Supreme Court's refusal to take this approach implies, equally well, a willingness to accept the validity of the executive order. We thus hold fast to our previous determination that E.O. 11246 was a proper exercise of congressionally delegated authority.

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8. Pub.L. No. 92-261, 86 Stat. 103 (amending the Civil Rights Act of 1964).

[4] By establishing a course of analysis different from the one we used for determining whether regulations promulgated under E.O. 11246 have the force and effect of law, the *Chrysler* case does require us to reexamine the regulation in dispute in these cases, 41 C.F.R. § 60-1.4(e) (1979).[9] Our conclusion as to its validity, however, remains the same. *Chrysler* establishes two prerequisites for a regulation to have the force and effect of law. The promulgation of the regulation must satisfy the procedural requirements imposed by Congress, and, as stated above, it must be within the contemplation of some congressionally delegated authority. Unlike the regulations at issue in *Chrysler*, the promulgation of 41 C.F.R. § 60-1.4(e) (1979) did comport with the provisions of § 4 of the Administrative Procedure Act, 5 U.S.C. § 553.[10] Our analysis turns then to whether the regulation is contemplated by the sources of congressional authority we cite for it.

[5] That analysis begins with the conclusion we have already reached: *Chrysler* does not undermine our holding that E.O. 11246 is itself firmly rooted in congressionally

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9. 41 C.F.R. § 60-1.4(e) provides:

Incorporation by operation of the Order.—By operation of the Order, the equal opportunity clause shall be considered to be a part of every contract and subcontract required by the Order and the regulations in this part to include such a clause whether or not it is physically incorporated in such contracts and whether or not the contract between the agency and the contractor is written.

10. Section 4 requires that notice of proposed rules be published in the Federal Register no less than 30 days before their effective date, and that interested parties be given an opportunity to be heard before promulgation of the rule. The required notice for the rules here in dispute was published on February 15, 1968, well over 30 days before their promulgation on May 28, 1968. *See* 33 Fed.Reg. 3000, 7804 (1968). Although § 60-1.4(e) was not among the rules specifically set out in the notice of proposed rulemaking, the notice sufficiently identified the subject and issues involved so as to satisfy 5 U.S.C. § 553(b)(3). *See generally* K. Davis, Administrative Law Treatise § 6.25 (1978).

delegated authority. From there it is but a short step to the conclusion that the regulation is also within the contemplation of that grant of authority. The order states that, with a few exceptions, all government contracts shall include a clause requiring the party contracting with the government to take affirmative action to increase the hiring of members of racial minorities and other traditionally disadvantaged groups. The regulation merely states that such a clause is deemed a part of all government contracts whether or not the contract is written and whether or not the clause is physically incorporated in the contract. The regulation is an evocation of the strict policy that the affirmative action obligation is an understood and unalterable part of doing business with the government. If the federal government has the power to impose the affirmative action obligation at all, it must certainly have the power to impose it without exception. As we stated in *United States v. New Orleans Public Service, Inc.*, 553 F.2d at 465, the regulation does "nothing more than give teeth to the mandate of the Order".

[6] Our holding that the executive order can validly be applied to NOPSI and MP&L does not, however, rest solely on the validity of 41 C.F.R. § 60-1.4(e). As stated above, that regulation embodies a long-standing, congressionally approved policy in government procurement: anyone who wishes to do business with the government must assume the affirmative action obligations required by the executive order. This policy is so well known and well entrenched that anyone who does business with the government is held to that obligation.[11] NOPSI and MP&L

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11. As the decision in *Barlow's* makes clear, implied consent to administrative searches is not easily found. This does not, however, affect our holding that the companies assumed the affirmative action obligation by dealing with the government.

(Continued on following page)

of course have not disputed the pervasiveness of the requirement. We conclude that, even absent the disputed regulation, they have accepted the affirmative action obligations contained in E.O. 11246 by dealing with the government.[12]

Footnote continued—

It is one thing to say that the companies' action in furnishing services to the government implies an acceptance of a policy of non-discrimination and affirmative action; it is entirely another to say that it also implies a willingness to give up fourth amendment rights.

12. At oral argument we requested supplemental briefs on the inherent powers of the President as a source for E.O. 11246, an issue roundly debated by the commentators. *See, e. g.*, Brody, *Congress, The President, and Federal Equal Employment Policymaking: A Problem in Separation of Powers*, 60 B.U.L. Rev. 239 (1980); Fleishman & Aufses, *Law and Orders: The Problem of Presidential Legislation*, 40 Law & Contemp. Prob. 1 (Summer, 1976); Note, *Doing Good the Wrong Way: The Case for Delimiting Presidential Power Under Executive Order No. 11,246*, 33 Vand.L.Rev. 921 (1980); Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U.Chi.L. Rev. 723 (1972). Although our holding obviates the need to explore in detail the arguments advanced by counsel on this issue, we sketch them briefly here.

The issue centers on the extent of the power granted by two clauses of Article II of the Constitution: section 1, clause 1, which states that "executive power shall be vested in a President of the United States of America", and section 3, which states that the President "shall take care that the laws be faithfully executed". Most discussion on this point springs from the Supreme Court's decision in *Youngstown Sheet and Tube Co. v. Sawyer*, 1952, 343 U.S. 579, 585, 72 S.Ct. 863, 96 L.Ed. 1153, a case whose instructions cannot easily be gleaned since all six justices in the majority issued separate opinions. One line of argument follows Justice Black's view that policymaking is entirely Congress's province. Thus, to the extent that the executive order creates, rather than merely executes, fair employment policy, it is beyond the power of the executive. The construct more often referred to, however, is the one elaborated by Justice Jackson in his famous concurrence. 343 U.S. at 634-38, 72 S.Ct. at 888, 871. In his view, presidential authority can be arrayed in three categories, being strongest when he acts with the express or implied approval of Congress, weakest when he acts contrary to some express or implied will of Congress, and in a "zone of twilight" when Congress has expressed no will at all. We continue to hold the view, expressed in our first opinion, that E.O. 11246 is executive action that falls within the strongest category of presidential authority. *See* 553 F.2d at 467 n.8. *But see Liberty Mutual Life Insurance Co. v. Friedman*, ... F.2d ....., 4 Cir. 1981, No. 80-1078.

III.

Finally, we turn to the issue that prompted the Supreme Court to vacate and remand these cases for reconsideration in light of *Marshall v. Barlow's, Inc.*, 1978, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305. In our first decision, we rejected the companies' contention that the executive order and its regulations violated the fourth amendment because they authorized warrantless searches of the companies' records. The holding relied heavily on two cases that have created what is now known as the *Colonnade-Biswell* exception to the warrant requirement. *See Colonnade Catering Corp. v. United States*, 1970, 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 and *United States v. Biswell*, 1972, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87. Those two cases upheld statutorily authorized, warrantless searches of businesses in two heavily regulated industries, liquor and firearms. The *Colonnade* and *Biswell* decisions have been interpreted to mean that one who enters those businesses impliedly consents to warrantless inspections because such inspections are essential to the enforcement of the regulatory scheme. *Almeida-Sanchez v. United States*, 1973, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596. Extending that implied consent concept to our cases, we concluded that "where, as here, the Government validly regulates any business, the Government has a right to include in its regulations the requirement that certain records be kept open to official inspection so that the administrative agency can determine whether the company is complying". *United States v. New Orleans Public Service, Inc.*, 553 F.2d at 472.

Marshall v. Barlow's Inc. limited the reach of the *Colonnade-Biswell* exception. In so doing, it may have cast doubt on our use of the implied consent concept we derived from those cases. *See generally*, Note, *Rationaliz-*

ing Administrative Searches, 77 Mich.L.Rev. 1291, 1315-19 (1979). But that is a question we need not now reach, for *Barlow's* presents us with a firmer basis on which to uphold the inspection scheme erected by the regulations here.

[7] At issue in *Barlow's* was the constitutionality of § 8(a) of the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. § 657(a), which authorized warrantless searches of the business premises of employers covered under the Act. The Secretary of Labor, who is charged with enforcing OSHA, argued under *Colonnade* and *Biswell* that the employer had impliedly consented to search, and that in any case, warrantless searches were reasonable under the fourth amendment because they were sufficiently restricted by agency regulations and were essential to effective enforcement of the Act. In rejecting both arguments, the Supreme Court stated that OSHA was unconstitutional "insofar as it purports to authorize inspections without a warrant *or its equivalent*". 436 U.S. at 325, 98 S.Ct. at 1827, 56 L.Ed.2d at 319 (emphasis added). We take the italicized words to mean that a formal judicial warrant is not required in all administrative searches if the enforcement procedures contained in the relevant statutes and regulations provide, in both design and practice, safeguards roughly equivalent to those contained in traditional warrants. For instance, the Supreme Court in *Barlow's* pointed to several statutes that allow for resort to federal courts to enforce administrative searches against unwilling parties, by whatever order or remedy is appropriate. 436 U.S. at 321 nn. 18 & 19, 98 S.Ct. at 1825 nn. 18 & 19, 56 L.Ed.2d at 317 nn. 18 & 19. If the statutory or regulatory scheme provides for resort to the federal courts before an inspection is forced upon a party, then the inspection provisions will not themselves run afoul of the fourth amendment. The procedures at issue here, like the statutes cited in *Barlow's* fulfill that requirement. 41 C.F.R. § 60-1.26.

[8] After that initial determination, it is then the task of the district court to measure the specific search that is sought against the broad fourth amendment test of "reasonableness". *Camara v. Municipal Court*, 1967, 387 U.S. 523, 538-39, 87 S.Ct. 1717, 1735-36, 18 L.Ed.2d 930, 940-41. The proper elements of such an inquiry necessarily must vary with the nature and circumstances of the search that is desired, although *Barlow's* gives some general guidance to the district court. One element of the question is whether the proposed search is authorized by statute, and a second is whether it is properly limited in scope. 436 U.S. at 323, 98 S.Ct. at 1826, 56 L.Ed.2d at 318. A third element should be an examination of how the agency chose to initiate this particular search. The search will be reasonable if based either on (1) specific evidence of an existing violation, (2) "a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]' ", 436 U.S. at 320-21, 98 S.Ct. at 1824, 56 L.Ed.2d at 316, (quoting *Camara*, 387 U.S. at 538, 87 S.Ct. at 1736, 18 L.Ed.2d at 940), or (3) a showing that the search is "pursuant to an administrative plan containing specific neutral criteria". 436 U.S. at 323, 98 S.Ct. at 1826, 56 L.Ed.2d at 318. It is important that "the decision to enter and inspect . . . not be the product of the unreviewed discretion of the enforcement officer in the field". *See v. Seattle*, 1967, 387 U.S. 541, 545, 87 S.Ct. 1737, 1740, 18 L.Ed.2d 943, 947.

[9] A district court may find other questions relevant to the reasonableness of the proposed search under the fourth amendment, but these three elements, at least, are essential. We find no indication in the record, however, that the district courts considered any of the three. Of course, the first two are questions of law that we may decide on appeal. Our first opinions in these cases have already concluded that E.O. 11246 and the regulations

thereunder are statutorily authorized. *New Orleans Public Service*, 5 Cir. 1977, 553 F.2d 459; *Mississippi Power & Light*, 5 Cir. 1977, 553 F.2d 480. The inspections sought here are clearly within that statutory authority. Similarly, because the searches are restricted to an inspection solely of business records to test compliance with the affirmative action program, they are properly limited in scope. But the third inquiry is a factual question, and the record does not provide us with enough information to reach a decision ourselves. We must therefore remand to the district court for that determination.[13]

If the district court finds that the requested searches satisfy the fourth amendment standards of reasonableness outlined above, there will be no further objections that NOPSI and MP&L can raise, and the district court should immediately issue the injunctions requested by the United States. The government's efforts to conduct a compliance review of NOPSI date from 1969, and this action began in 1973. NOPSI's *fides* may be as *bona* as when we first relied on it in our June 1977 opinion, 553 F.2d at 474-75, but the time has come to bring this litigation to a conclusion, without further opportunity for delay.

The Court has considered all of the contentions the appellants have argued orally or by brief, including the contentions not discussed in this opinion.

We VACATE the orders entered by the district courts and REMAND these cases for further proceedings consistent with this opinion.

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13. For a survey of the types of criteria courts have evaluated to satisfy this inquiry, *see generally* Note, *Camara, See, and Their Progeny: Another Look at Administrative Inspections Under The Fourth Amendment*, 15 Colum.J. of L. & Soc.Prob. 61, 78-96 (1979).

APPENDIX B

U.S. v. MISSISSIPPI & L CO.

U.S. District Court,
Southern District of Mississippi

UNITED STATES OF AMERICA v. MISSISSIPPI POWER & LIGHT COMPANY, No. J74-160(R), May 30, 1979; Judgment June 1, 1979

* * *

Full Text of Oral Opinion

RUSSELL, Chief Judge: — All right, since there has been no evidentiary hearing and no testimony in this case, and merely the briefs have been submitted on the law, and what's been before this court before, I thought it best that we probably have the court reporter here to take down the opinion of the court in case there is additional review of the matter. So, briefly stating it, this case, of course, the background — it's been to the Supreme Court, certiorari was granted, and the Fifth Circuit's affirmance of this opinion was stated in the Supreme Court's opinion vacated, and the case remanded for further consideration in light of Marshall v. Barlow, Inc., which is referred in 436, U.S. 307, 436, U.S. 1942, which is a 1978 case. Now, in the instant case, which is 553, Fed. 2d, 480 [14 FEP Cases 1730], the Fifth Circuit of 1977, was considered along with an analogous case, which is the New Orleans Public Service, Inc., which we refer to as NOPSI, in 553 Fed. 2d, 480 [14 FEP Cases 1734], and in both cases are now on remand. This one to this court, and NOPSI to the District Court in Louisiana.

The Defendant's motion raises many points and alleged infirmities regarding the executive order, which is 11246. In essence, the defendant seeks to re-open the entire case, or states that the entire matter — the executive order 11246, is invalid, but the defendants argue that since the entire case was vacated, that the entire matter is therefore open to re-litigation, but this is simply not the case. The Supreme Court vacated for consideration in light of Barlow. Therefore, that is the only issue to be addressed in this matter and that was the Fourth Amendment search problems that we had. The lower court is bound to comply with the mandate of the appellate court, so and if the cause is remanded for a specific purpose, any proceedings inconsistent therewith is in error, as pointed out by Mefford v. Gardner, 383 Fed.2d, 748, a Sixth Circuit opinion. Thus, the case may properly be limited to a consideration in light of Barlow, and defendant denied an opportunity to re-open the entire case. There is no need to reconsider what this court previously held and which the Fifth Circuit Court affirmed. That is: One, the executive order, 11246, is valid; and two, the rules and regulations issued pursuant thereto are vacated or valid and have the force and effect of law; and three, that Mississippi Power and Light Corporation is a government contractor subject to executive order; and four, Mississippi Power and Light Company has violated the executive order by refusing to comply with it. The only ground the Fifth Circuit Court differed on was to dissolve this court's general injunction and direct the parties to utilize the government's administrative conciliation process, and I understand that was done during the course of the argument before the Fifth Circuit Court of Appeals, and this is now prayed for in Paragraph 3 of this motion. Thus, the only issue the court need consider is whether under Barlow, the defendant has a valid Fourth Amendment objection to the executive order and the rules

and regulations. Section 202 of the order provides that the non-discrimination clause will be incorporated into every government contract. In Section 202(5), provides that government contractors, Mississippi Power and Light, shall provide access to their books, records and so forth, to determine compliance with the executive order. Having agreed by contract as previously held and affirmed, as to Section 202(5), Mississippi Power and Light Company has, in effect, and fact, consented to the search, and given consent, the administrative searches are not unreasonable under the Fourth Amendment. This seems a proper case for application of acceptance found in Collonade and Biswell, which was a Fifth Circuit case, and stating in that, 2(a) that a defendant of public utilities is subject to close regulation and (b) the executive order has been in existence for about forty years. This shows a long pattern of regulation of government contractors. These factors lead to the conclusion that defendant has no reasonable expectation of privacy, and as stated in Marshall v. Barlow, which has been stated here previously, the element that distinguishes these enterprises from ordinary business in their long tradition of close government supervision, of which any person, who chooses to enter such a business must always be aware. A central difference between those cases, Collonade and Biswell, which we referred to, and this one which is the Barlow case, is that businessmen, engaged in such federally licensed and regulated enterprises, accept the burdens as well as the benefits of that trade, whereas, the petitioner here, that was in Barlow, was not engaged in any regulated or licensed business, but businessmen in a regulated industry, in effect, consent to the restrictions placed upon them. That's the holding in Marshall v. Barlow. Unlike Section 8(a) of the OSHA considered in Barlow, the order and regulations here are not self-ex-

ecuted. That is, if entry is refused, the secretary may refer the matter to the Justice Department to seek compliance as stated in the plaintiff's brief at Page 12, "The compliance mechanism is identical to those in other acts, like the Mining Safety Act, which the Supreme Court referred to approvingly in Barlow. Under this enforcement mechanism, Mississippi Power and Light Company's rights have been more than amply protected. As noted, Mississippi Power and Light Company having chosen to contract with the government and submit itself to a full arsenal of governmental regulations, must accept the burdens as well as the benefits of its trade," and that's a quotation. So thus I feel that the government's position is well taken, and that will be the ruling of the court.

All right, then. I believe that under the motion that the government has made, that Mississippi Power and Light Company will be authorized to proceed at once by administrative action and that to also direct Mississippi Power and Light Company, the Department of Labor shall in good faith seek to resolve through conciliation the issue of the company's substantive compliance with the executive order and the rules and regulations issued pursuant thereto, within ninety days from the entry of this judgment. Naturally, this court will retain jurisdiction of this action, for entry of all orders, judgments, or decrees which may be necessary to effectuate Mississippi Power and Light Company's full and complete compliance with the executive order and rules and regulations. So, that will be the ruling of the court. You may furnish me with an order to that effect.

APPENDIX C

(Filed April 27, 1981)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
October Term, 19

No. 79-2636

D. C. Docket No. CA 74 160 R

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MISSISSIPPI POWER & LIGHT COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Mississippi

Before WISDOM, GARZA and REAVLEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, vacated; and that this cause be, and the same is hereby remanded for further proceedings to the said District Court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that defendant-appellant be condemned to pay two-thirds of the costs on appeal to be taxed by the Clerk of this Court; and that the plaintiff-appellee be condemned to pay one-third of said costs.

MARCH 6, 1981

ISSUED AS MANDATE: APR 23 1981

APPENDIX D

E.O. 11246 ON NONDISCRIMINATION UNDER FEDERAL CONTRACTS

Text of Executive Order 11246, signed by President Johnson September 24, 1965, as amended by Executive Order 11375, signed October 13, 1967. Amended Part I, effective November 12, 1967, was superseded by Executive Order 11478 (See 401:1101), amended to add sex as prohibited basis of discrimination, effective October 13, 1968.

Under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

PART I—Nondiscrimination in Government Employment

Ed. Note: Secs. 101-105, barring discrimination in federal employment on account of race, color, religion, sex, or national origin, were superseded by Executive Order 11478. These provisions called for affirmative-action programs for equal opportunity at the agency level under general supervision of the Civil Service Commission; establishment of complaint procedures at each agency with appeal to the Commission; and promulgation of regulations by CSC. (401:1101.)

PART II—NONDISCRIMINATION IN EMPLOYMENT BY GOVERNMENT CONTRACTORS AND SUBCONTRACTORS

Subpart A—Duties of the Secretary of Labor

Sec. 201. The Secretary of Labor shall be responsible for the administration of Parts II and III of this Order

and shall adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes thereof.

Subpart B—Contractors' Agreements

Sec. 202. Except in contracts exempted in accordance with Section 204 of this Order, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

"During the performance of this contract, the contractor agrees as follows:

"(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

"(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

"(3) The contractor will send to each labor union or representative of workers with which he has a collec-

tive bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under Section 202 of Executive Order No. 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

"(4) The contractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

"(5) The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contacting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

"(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be cancelled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

"(7) The contractor will include the provisions of Paragraphs (1) through (7) in every subcontract or pur-

chase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance: *Provided*, however, That in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States."

Sec. 203. (a) Each contractor having a contract containing the provisions prescribed in Section 202 shall file, and shall cause each of his subcontractors to file, Compliance Reports with the contracting agency or the Secretary of Labor as may be directed. Compliance Reports shall be filed within such times and shall contain such information as to the practices, policies, programs, and employment policies, programs, and employment statistics of the contractor and each subcontractor, and shall be in such form, as the Secretary of Labor may prescribe.

(b) Bidders or prospective contractors or subcontractors may be required to state whether they have participated in any previous contract subject to the provisions of this Order, or any preceding similar Executive order, and in that event to submit, on behalf of themselves and their proposed subcontractors, Compliance Reports prior to or as an initial part of their bid or negotiation of a contract.

(c) Whenever the contractor or subcontractor has a collective bargaining agreement or other contract or

understanding with a labor union or an agency referring workers or providing or supervising apprenticeship or training for such workers, the Compliance Report shall include such information as to such labor union's or agency's practices and policies affecting compliance as the Secretary of Labor may prescribe: *Provided*, That to the extent such information is within the exclusive possession of a labor union or an agency referring workers of providing or supervising apprenticeship or training and such labor union or agency shall refuse to furnish such information to the contractor, the contractor shall so certify to the contracting agency as part of its Compliance Report and shall set forth what efforts he has made to obtain such information.

(d) The contracting agency or the Secretary of Labor may direct that any bidder or prospective contractor or subcontractor shall submit, as part of his Compliance Report, a statement in writing, signed by an authorized officer or agent on behalf of any labor union or any agency referring workers or providing or supervising apprenticeship or other training, with which the bidder or prospective contractor deals, with supporting information, to the effect that the signer's practices and policies do not discriminate on the grounds of race, color, religion, sex, or national origin, and that the signer either will affirmatively cooperate in the implementation of the policy and provisions of this Order or that it consents and agrees that recruitment, employment, and the terms and conditions of employment under the proposed contract shall be in accordance with the purposes and provisions of the Order. In the event that the union, or the agency shall refuse to execute such a statement, the Compliance Report shall so certify and set forth what efforts have been made to secure such a statement and such additional factual

material as the contracting agency or the Secretary of Labor may require.

Sec. 204. The Secretary of Labor may, when he deems that special circumstances in the national interest so require, exempt a contracting agency from the requirement of including any or all of the provisions of Section 202 of this Order in any specific contract, subcontract, or purchase order. The Secretary of Labor may, by rule or regulation, also exempt certain classes of contracts, subcontracts, or purchase orders (1) whenever work is to be or has been performed outside the United States and no recruitment of workers within the limits of the United States is involved; (2) for standard commercial supplies or raw materials; (3) involving less than specified amounts of money or specified numbers of workers; or (4) to the extent that they involve subcontracts below a specified tier. The Secretary of Labor may also provide, by rule, regulation, or order, for the exemption of facilities of a contractor which are in all respects separate and distinct from activities of the contractor related to the performance of the contract: *Provided*, That such an exemption will not interfere with or impede the effectuation of the purposes of this Order: *And provided further*, That in the absence of such an exemption all facilities shall be covered by the provisions of this Order.

Subpart C—Powers and Duties of the Secretary of Labor and the Contracting Agencies

Sec. 205. Each contracting agency shall be primarily responsible for obtaining compliance with the rules, regulations, and orders of the Secretary of Labor with respect to contracts entered into by such agency or its contractors. All contracting agencies shall comply with the rules of the Secretary of Labor in discharging their primary respon-

sibility for securing compliance with the provisions of contracts and otherwise with the terms of this Order and of the rules, regulations, and orders of the Secretary of Labor issued pursuant to this Order. They are directed to cooperate with the Secretary of Labor and to furnish the Secretary of Labor such information and assistance as he may require in the performance of his functions under this Order. They are further directed to appoint or designate, from among the agency's personnel, compliance officers. It shall be the duty of such officers to seek compliance with the objectives of this Order by conference, conciliation, mediation, or persuasion.

Sec. 206. (a) The Secretary of Labor may investigate the employment practices of any Government contractor or subcontractor, or initiate such investigation by the appropriate contracting agency, to determine whether or not the contractual provisions specified in Section 202 of this Order have been violated. Such investigation shall be conducted in accordance with the procedures established by the Secretary of Labor and the investigating agency shall report to the Secretary of Labor any action taken or recommended.

(b) The Secretary of Labor may receive and investigate or cause to be investigated complaints by employees or prospective employees of a Government contractor or subcontractor which allege discrimination contrary to the contractual provisions specified in Section 202 of this Order. If this investigation is conducted for the Secretary of Labor by a contracting agency, that agency shall report to the Secretary what action has been taken or is recommended with regard to such complaints.

Sec. 207. The Secretary of Labor shall use his best efforts, directly and through contracting agencies, other

interested Federal, State, and local agencies, contractors, and all other available instrumentalities to cause any labor union engaged in work under Government contracts or any agency referring workers or providing or supervising apprenticeship or training for or in the course of such work to cooperate in the implementation of the purposes of this Order. The Secretary of Labor shall, in appropriate cases, notify the Equal Employment Opportunity Commission, the Department of Justice, or other appropriate Federal agencies whenever it has reason to believe that the practices of any such labor organization or agency violate Title VI or Title VII of the Civil Rights Act of 1964 or other provision of Federal law.

Sec. 208. (a) The Secretary of Labor, or any agency, officer, or employee in the executive branch of the Government designated by rule, regulation, or order of the Secretary, may hold such hearings, public or private, as the Secretary may deem advisable for compliance, enforcement, or educational purposes.

(b) The Secretary of Labor may hold, or cause to be held, hearings in accordance with Subsection (a) of this Section prior to imposing, ordering, or recommending the imposition of penalties and sanctions under this Order. No order for debarment of any contractor from further Government contracts under Section 209(a)(6) shall be made without affording the contractor an opportunity for a hearing.

Subpart D—Sanctions and Penalties

Sec. 209. (a) In accordance with such rules, regulations, or orders as the Secretary of Labor may issue or adopt, the Secretary or the appropriate contracting agency may:

(1) Publish, or cause to be published, the names of contractors or unions which it has concluded have complied or have failed to comply with the provisions of this Order or of the rules, regulations, and orders of the Secretary of Labor.

(2) Recommend to the Department of Justice that, in cases in which there is substantial or material violation or the threat of substantial or material violation of the contractual provisions set forth in Section 202 of this Order, appropriate proceedings be brought to enforce those provisions, including the enjoining, within the limitations of applicable law, of organizations, individuals, or groups who prevent directly or indirectly, or seek to prevent directly or indirectly, compliance with the provisions of this Order.

(3) Recommend to the Equal Employment Opportunity Commission or the Department of Justice that appropriate proceedings be instituted under Title VII of the Civil Rights Act of 1964.

(4) Recommend to the Department of Justice that criminal proceedings be brought for the furnishing of false information to any contracting agency or to the Secretary of Labor as the case may be.

(5) Cancel, terminate, suspend, or cause to be cancelled, terminated, or suspended, any contract, or any portion or portions thereof, for failure of the contractor or subcontractor to comply with the nondiscrimination provisions of the contract. Contracts may be cancelled, terminated, or suspended absolutely or continuance of contracts may be conditioned upon a program for future compliance approved by the contracting agency.

(6) Provide that any contracting agency shall refrain from entering into further contracts, or extensions or other

modifications of existing contracts, with any noncomplying contractor, until such contractor has satisfied the Secretary of Labor that such contractor has established and will carry out personnel and employment policies in compliance with the provisions of this Order.

(b) Under rules and regulations prescribed by the Secretary of Labor, each contracting agency shall make reasonable efforts within a reasonable time limitation to secure compliance with the contract provisions of this Order by methods of conference, conciliation, mediation, and persuasion before proceedings shall be instituted under Subsection (a) (2) of this Section, or before a contract shall be cancelled or terminated in whole or in part under Subsection (a) (5) of this Section for failure of a contractor or subcontractor to comply with the contract provisions of this Order.

Sec. 210. Any contracting agency taking any action authorized by this Subpart, whether on its own motion, or as directed by the Secretary of Labor, or under the rules and regulations of the Secretary, shall promptly notify the Secretary of such action. Whenever the Secretary of Labor makes a determination under this Section, he shall promptly notify the appropriate contracting agency of the action recommended. The agency shall take such action and shall report the results thereof to the Secretary of Labor within such time as the Secretary shall specify.

Sec. 211. If the Secretary shall so direct, contracting agencies shall not enter into contracts with any bidder or prospective contractor unless the bidder or prospective contractor has satisfactorily complied with the provisions of this Order or submits a program for compliance acceptable to the Secretary of Labor or, if the Secretary so authorizes, to the contracting agency.

Sec. 212. Whenever a contracting agency cancels or terminates a contract, or whenever a contractor has been debarred from further Government contracts, under Section 209 (a) (6) because of noncompliance with the contract provisions with regard to nondiscrimination, the Secretary of Labor or the contracting agency involved, shall promptly notify the Comptroller General of the United States. Any such debarment may be rescinded by the Secretary of Labor or by the contracting agency which imposed the sanction.

Subpart E—Certificates of Merit

Sec. 213. The Secretary of Labor may provide for issuance of a United States Government Certificate of Merit to employers or labor unions, or other agencies which are or may hereafter be engaged in work under Government contracts, if the Secretary is satisfied that the personnel and employment practices of the employer, or that the personnel training, apprenticeship, membership, grievance and representation, upgrading, and other practices and policies of the labor union or other agency conform to the purposes and provisions of this Order.

Sec. 214. Any Certificate of Merit may at any time be suspended or revoked by the Secretary of Labor if the holder thereof, in the judgment of the Secretary, has failed to comply with the provisions of this Order.

Sec. 215. The Secretary of Labor may provide for the exemption of any employer, labor union, or other agency from any reporting requirements imposed under or pursuant to this Order if such employer, labor union, or other agency has been awarded a Certificate of Merit which has not been suspended or revoked.

PART III—NONDISCRIMINATION PROVISIONS IN FEDERALLY ASSISTED CONSTRUCTION CONTRACTS

Sec. 301. Each executive department and agency which administers a program involving Federal financial assistance shall require as a condition for the approval of any grant, contract, loan, insurance, or guarantee thereunder, which may involve a construction contract, that the applicant for Federal assistance undertake and agree to incorporate, or cause to be incorporated, into all construction contracts paid for in whole or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to such grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, the provisions prescribed for Government contracts by Section 203 of this Order or such modification thereof, preserving in substance the contractor's obligations thereunder, as may be approved by the Secretary of Labor, together with such additional provisions as the Secretary deems appropriate to establish and protect the interest of the United States in the enforcement of those obligations. Each such applicant shall also undertake and agree (1) to assist and cooperate actively with the administering department or agency and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with those contract provisions and with the rules, regulations, and relevant orders of the Secretary, (2) to obtain and to furnish to the administering department or agency and to the Secretary of Labor such information as they may require for the supervision of such compliance, (3) to carry out sanctions and penalties for violation of such obligations imposed upon contractors and subcontractors by the Secretary of Labor or the administering department or agency

pursuant to Part II, Subpart D, of this Order, and (4) to refrain from entering into any contract subject to this Order, or extension or other modification of such a contract with a contractor debarred from Government contracts under Part II, Subpart D, of this Order.

Sec. 302. (a) "Construction contract" as used in this Order means any contract for the construction, rehabilitation, alteration, conversion, extension, or repair of buildings, highways, or other improvements to real property.

(b) The provisions of Part II of this Order shall apply to such construction contracts, and for purposes of such application the administering department or agency shall be considered the contracting agency referred to therein.

(c) The term "applicant" as used in this Order means an applicant for Federal assistance or, as determined by agency regulation, other program participant, with respect to whom an application for any grant, contract, loan, insurance, or guarantee is not finally acted upon prior to the effective date of this Part, and it includes such an applicant after he becomes a recipient of such Federal assistance.

Sec. 303. (a) Each administering department and agency shall be responsible for obtaining the compliance of such applicants with their undertakings under this Order. Each administering department and agency is directed to cooperate with the Secretary of Labor, and to furnish the Secretary such information and assistance as he may require in the performance of his functions under this Order.

(b) In the event an applicant fails and refuses to comply with his undertakings, the administering department or agency may take any or all of the following actions: (1) cancel, terminate, or suspend in whole or

in part the agreement, contract, or other arrangement with such applicant with respect to which the failure and refusal occurred; (2) refrain from extending any further assistance to the applicant under the program with respect to which the failure or refusal occurred until satisfactory assurance of future compliance has been received from such applicant; and (3) refer the case to the Department of Justice for appropriate legal proceedings.

(c) Any action with respect to an applicant pursuant to Subsection (b) shall be taken in conformity with Section 602 of the Civil Rights Act of 1964 (and the regulations of the administering department or agency issued thereunder), to the extent applicable. In no case shall action be taken with respect to an applicant pursuant to Clause (1) or (2) of Subsection (b) without notice and opportunity for hearing before the administering department or agency.

Sec. 304. Any executive department or agency which imposes by rule, regulation, or order requirements of nondiscrimination in employment, other than requirements imposed pursuant to this Order, may delegate to the Secretary of Labor by agreement such responsibilities with respect to compliance standards, reports, and procedures as would tend to bring the administration of such requirements into conformity with the administration of requirements imposed under this Order: *Provided*, That actions to effect compliance by recipients of Federal financial assistance with requirements imposed pursuant to Title VI of the Civil Rights Act of 1964 shall be taken in conformity with the procedures and limitations prescribed in Section 602 thereof and the regulations of the administering department or agency issued thereunder.

PART IV—MISCELLANEOUS

Sec. 401. The Secretary of Labor may delegate to any officer, agency, or employee in the Executive branch of the Government, any function or duty of the Secretary under Parts II and III of this Order, except authority to promulgate rules and regulations of a general nature.

Sec. 402. The Secretary of Labor shall provide administrative support for the execution of the program known as the "Plans for Progress."

Sec. 403. (a) Executive Orders Nos. 10590 (January 18, 1955), 10722 (August 5, 1957), 10925 (March 6, 1961), 11114 (June 22, 1963), and 11162 (July 28, 1964), are hereby superseded and the President's Committee on Equal Employment Opportunity established by Executive Order No. 10925 is hereby abolished. All records and property in the custody of the Committee shall be transferred to the Civil Service Commission and the Secretary of Labor, as appropriate.

(b) Nothing in this Order shall be deemed to relieve any person of any obligation assumed or imposed under or pursuant to any Executive Order superseded by this Order. All rules, regulations, orders, instructions, designations, and other directives issued by the President's Committee on Equal Employment Opportunity and those issued by the heads of various departments or agencies under or pursuant to any of the Executive orders superseded by this Order, shall, to the extent that they are not inconsistent with this Order, remain in full force and effect unless and until revoked or superseded by appropriate authority. References in such directives to provisions of the superseded orders shall be deemed to be references to the comparable provisions of this Order.

Sec. 404. The General Services Administration shall take appropriate action to revise the standard Government contract forms to accord with the provisions of this Order and of the rules and regulations of the Secretary of Labor.

Sec. 405. This Order shall become effective 30 days after the date of this Order.

APPENDIX E

Office of Federal Contract Compliance Programs Department of Labor

Rules and Regulations

Following is the text of FOCCP Rules and Regulations, codified as 41 CFR 60-1, which reads as last amended at 45 FR 9271, effective February 12, 1980. Revisions to these regulations promulgated on December 30, 1980 (45 Fed. Reg. 86216) have been stayed pending further review. 46 Fed. Reg. 9950 (Jan. 30, 1981).

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Chapter 60—Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor

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Part 60-1—Obligations of Contractors and Subcontractors

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Sec.

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SUBPART A—PRELIMINARY MATTERS; EQUAL OPPORTUNITY CLAUSE; COMPLIANCE REPORTS

§ 60-1.1 Purpose and application.

The purpose of the regulations in this part is to achieve the aims of Parts II, III, and IV of Executive Order 11246 for the promotion and insuring of equal opportunity for all persons, without regard to race, color, religion, sex, or national origin, employed or seeking employment with Government contractors or with contractors performing under federally assisted construction contracts. The regulations in this part apply to all contracting agencies of the Government and to contractors and subcontractors who perform under Government contracts, to the extent set forth in this part. The regulations in this part also apply to all agencies of the Government administering programs involving Federal financial assistance which may include a construction contract, and to all contractors and subcontractors performing under construction contracts which are related to any such programs. The procedures set forth in the regulations in this part govern all disputes relative to a contractor's compliance with his obligations under the equal opportunity clause regardless of whether or not his contract contains a "Disputes" clause. Failure of a contractor or applicant to comply with any provision of the regulations in this part shall be grounds for the imposition of any or all of the sanctions authorized by the order. The regulations in this part do not apply to any action taken to effect compliance with respect to employment practices subject to Title VI of the Civil Rights Act of 1964. The rights and remedies of the Government hereunder are not exclusive and do not affect rights and remedies provided elsewhere by law, regulation, or contract; neither do the regulations limit the exercise by the Secretary of Govern-

ment agencies of powers not herein specifically set forth, but granted to them by the order.

§ 60-1.2 Administrative responsibility.

The Director has been delegated authority and assigned responsibility for carrying out the responsibilities assigned to the Secretary under the Executive order. All correspondence regarding the order should be directed to the Director, Office of Federal Contract Compliance, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, D.C. 20210.

§ 60-1.3 Definitions.

"Administering agency" means any department, agency and establishment in the executive branch of the Government, including any wholly owned Government corporation, which administers a program involving federally assisted construction contracts.

"Administrative law judge" means an administrative law judge appointed as provided in 5 U.S.C. 3105 and Subpart B of Part 930 of Title 5 of the Code of Federal Regulations (see 37 FR 16787) and qualified to preside at hearings under 5 U.S.C. 557.

"Agency" means any contracting or any administering agency of the Government.

"Applicant" means an applicant for Federal assistance involving a construction contract, or other participant in a program involving a construction contract as determined by regulation of an administering agency. The term also includes such persons after they become recipients of such Federal assistance.

"Construction work" means the construction, rehabilitation, alteration, conversion extension, demolition or re-

pair of buildings, highways, or other changes or improvements to real property, including facilities providing utility services. The term also includes the supervision, inspection and other onsite functions incidental to the actual construction.

"Contract" means any Government contract or any federally assisted construction contract.

"Contracting agency" means any department, agency, establishment, or instrumentality in the executive branch of the Government, including any wholly owned Government corporation, which enters into contracts.

"Contractor" means, unless otherwise indicated, a prime contractor or subcontractor.

"Director" means the Director, Office of Federal Contract Compliance Programs (OFCCP), U.S. Department of Labor or any person to whom he delegates authority under the regulations in this chapter.

"Equal opportunity clause" means the contract provisions set forth in § 60-1.4 (a) or (b), as appropriate.

"Federally assisted construction contract" means any agreement or modification thereof between any applicant and a person for construction work which is paid for in whole or in part with funds obtained from the Government or borrowed on the credit of the Government pursuant to any Federal program involving a grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, or any application or modification thereof approved by the Government for a grant, contract, loan, insurance, or guarantee under which the applicant itself participates in the construction work.

"Government" means the government of the United States of America.

"Government contract" means any agreement or modification thereof between any contracting agency and any person for the furnishing of supplies or services or for the use of real or personal property, including lease arrangements. The term "services", as used in this section includes, but is not limited to the following services: Utility construction, transportation, research, insurance, and fund depository. The term "Government contract" does not include (1) agreements in which the parties stand in the relationship of employer and employee, and (2) federally assisted construction contracts.

"Minority group" as used herein shall include, where appropriate, female employees and perspective female employees.

"Modification" means any alteration in the terms and conditions of a contract, including supplemental agreements, amendments, and extensions.

"Order," "Executive Order," or "Executive Order 11246" means parts II, III, and IV of the Executive Order 11246 dated September 24, 1965 (30 FR 12319), any Executive order amending such order, and any other Executive order superseding such order.

"Person" means any natural person, corporation, partnership, unincorporated association, State or local government, and any agency, instrumentality, or subdivision of such a government.

"Prime contractor" means any person holding a contract and, for the purposes of Subpart B of this part, any person who has held a contract, subject to the order.

"Recruiting and training agency" means any person who refers workers to any contractor or subcontractor or who provides for employment by any contractor or subcontractor.

"Rules, regulations, and relevant orders of the Secretary of Labor" used in paragraph (4) of the equal opportunity clause means rules, regulations, and relevant orders of the Secretary of Labor or his designee issued pursuant to the order.

"Secretary" means the Secretary of Labor, U.S. Department of Labor.

"Site of construction" means the general physical location of any building, highway, or other change or improvement to real property which is undergoing construction, rehabilitation, alteration, conversion, extension, demolition, or repair and any temporary location or facility at which a contractor, subcontractor, or other participating party meets a demand or performs a function relating to the contract or subcontract.

"Subcontract" means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):

(1) For the furnishing of supplies or services or for the use of real or personal property, including lease arrangements, which, in whole or in part, is necessary to the performance of any one or more contracts; or

(2) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken, or assumed.

"Subcontractor" means any person holding a subcontract and, for the purposes of Subpart B of this part, any person who has held a subcontract subject to the order. The term "First-tier subcontractor" refers to a subcontractor holding a subcontract with a prime contractor.

"United States" as used herein shall include the several States, the District of Columbia, the Commonwealth

of Puerto Rico, the Panama Canal Zone, and the possessions of the United States.

§ 60-1.4 Equal opportunity clause.

(a) *Government contracts* Except as otherwise provided, each contracting agency shall include the following equal opportunity clause contained in section 202 of the order in each of its Government contracts (and modifications thereof if not included in the original contract):

During the performance of this contract, the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this non-discrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

(3) The contractor will send to each labor union or representative of workers with which he has a collective

bargaining agreement or other contract or understanding, a notice to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under section 202 of Executive Order 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(5) The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be canceled, terminated or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(7) The contractor will include the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders

of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provision will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions including sanctions for noncompliance: *Provided, however,* that in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

(b) *Federally assisted construction contracts.* (1) Except as otherwise provided, each administering agency shall require the inclusion of the following language as a condition of any grant, contract, loan, insurance, or guarantee involving federally assisted construction which is not exempt from the requirements of the equal opportunity clause:

The applicant hereby agrees that it will incorporate or cause to be incorporated into any contract for construction work, or modification thereof, as defined in the regulations of the Secretary of Labor at 41 CFR Chapter 60, which is paid for in whole or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to a grant, contract, loan insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, the following equal opportunity clause:

During the performance of this contract the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, or national origin, such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive considerations for employment without regard to race, color, religion, sex, or national origin.

(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided advising the said labor union or workers' representatives of the contractor's commitments under this section, and shall post copies of the notice in conspicious places available to employees and applicants for employment.

(4) The contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(5) The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the administering agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rulles, regulations, and orders.

(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of the said rules, regulations, or orders, this contract may be canceled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts or federally assisted construction contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(7) The contractor will include the portion of the sentence immediately preceding paragraph (1) and the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontractor or purchase order as the administering agency may direct as a means of enforcing such provisions, including sanctions for noncompliance: *Provided, however,* That in the event a contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by

the administering agency the contractor may request the United States to enter into such litigation to protect the interests of the United States.

The applicant further agrees that it will be bound by the above equal opportunity clause with respect to its own employment practices when it participates in federally assisted construction work: *Provided,* That if the applicant so participating is a State or local government, the above equal opportunity clause is not applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract.

The applicant agrees that it will assist and cooperate actively with the administering agency and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with the equal opportunity clause and the rules, regulations, and relevant orders of the Secretary of Labor, that it will furnish the administering agency and the Secretary of Labor such information as they may require for the supervision of such compliance, and that it will otherwise assist the administering agency in the discharge of the agency's primary responsibility for securing compliance.

The applicant further agrees that it will refrain from entering into any contract or contract modification subject to Executive Order 11246 of September 24, 1965, with a contractor debarred from, or who has not demonstrated eligibility for, Government contracts and federally assisted construction contracts pursuant to the Executive order and will carry out such sanctions and penalties for violation of the equal opportunity clause as may be imposed upon contractors and subcontractors by the administering agency or the Secretary of Labor pursuant to Part II, Subpart D

of the Executive order. In addition, the applicant agrees that if it fails or refuses to comply with these undertakings, the administering agency may take any or all of the following actions: Cancel, terminate, or suspend in whole or in part this grant (contract, loan, insurance, guarantee); refrain from extending any further assistance to the applicant under the program with respect to which the failure or refund occurred until satisfactory assurance of future compliance has been received from such applicant; and refer the case to the Department of Justice for appropriate legal proceedings.

(c) *Subcontracts.*

Each nonexempt prime contractor or subcontractor shall include the equal opportunity clause in each of its nonexempt subcontracts.

(d) *Incorporation by reference.* The equal opportunity clause may be incorporated by reference in all Government contracts and subcontracts, including Government bills of lading, transportation requests, contracts for deposit of Government funds, and contracts for issuing and paying U.S. savings bonds and notes, and such other contracts and subcontracts as the Director may designate.

(e) *Incorporation by operation of the Order.* By operation of the Order, the equal opportunity clause shall be considered to be a part of every contract and subcontract required by the Order and the regulations in this part to include such a clause whether or not it is physically incorporated in such contracts and whether or not the contract between the agency and the contractor is written.

(f) *Adaptation of language.* Such necessary changes in language may be made in the equal opportunity clause as shall be appropriate to identify properly the parties and their undertakings.

§ 60-1.5 Exemptions.

(a) *General—(1) Transactions of $10,000 or under.* Contracts and subcontracts not exceeding $10,000, other than Government bills of lading, and other than contracts and subcontracts with depositories of Federal funds in any amount and with financial institutions which are issuing and paying agents for U.S. savings bonds and savings notes, are exempt from the requirements of the equal opportunity clause. In determining the applicability of this exemption to any federally assisted construction contract, or subcontract thereunder, the amount of such contract or subcontract rather than the amount of the Federal financial assistance shall govern. No agency, contractor, or subcontractor shall procure supplies or services in a manner so as to avoid applicability of the equal opportunity clause: Provided, that where a contractor has contracts or subcontracts with the Government in any 12-month period which have an aggregate total value (or can reasonably be expected to have an aggregate total value) exceeding $10,000, the $10,000 or under exemption does not apply, and the contracts are subject to the order and the regulations issued pursuant thereto regardless of whether any single contract exceeds $10,000.

(2) *Contracts and subcontracts for indefinite quantities.* With respect to contracts and subcontracts for indefinite quantities (including, but not limited to, open-end contracts, requirement-type contracts, Federal Supply Schedule contracts, "call-type" contracts, and purchase notice agreements, the equal opportunity clause shall be included unless the purchaser has reason to believe that the amount to be ordered in any year under such contract will not exceed $10,000. The applicability of the equal opportunity clause shall be determined by the purchaser at the time of award for the first year, and annually there-

after for succeeding years, if any. Notwithstanding the above, the equal opportunity clause shall be applied to such contract whenever the amount of a single order exceeds $10,000. Once the equal opportunity clause is determined to be applicable, the contract shall continue to be subject to such clause for its duration, regardless of the amounts ordered, or reasonably expected to be ordered in any year.

(3) *Work outside the United States.* Contracts and subcontracts are exempt from the requirements of the equal opportunity clause with regard to work performed outside the United States by employees who were not recruited within the United States.

(4) *Contracts with State or local governments.* The requirements of the equal opportunity clause in any contract or subcontract with a State or local government (or any agency, instrumentality or subdivision thereof) shall not be applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract or subcontract. In addition, any agency, instrumentality or subdivision of such government, except for educational institutions and medical facilities, are exempt from the requirements of filing the annual compliance report provided for by § 60-1.7(a)(1) and maintaining a written affirmative action compliance program prescribed by § 60-1.40 and part 60-2 of this chapter.

(5) *Contracts with certain educational institutions.* It shall not be a violation of the equal opportunity clause for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or

by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion. The primary thrust of this provision is directed at religiously oriented church-related colleges and universities and should be so interpreted.

(6) *Work on or near Indian reservations.* It shall not be a violation of the equal opportunity clause for a construction or nonconstruction contractor to extend a publicly announced preference in employment to Indians living on or near an Indian reservation in connection with employment opportunities on or near an Indian reservation. The use of the word "near" would include all that area where a person seeking employment could reasonably be expected to commute to and from in the course of a work day. Contractors or subcontractors extending such a preference shall not, however, discriminate among Indians on the basis of religion, sex, or tribal affiliation, and the use of such a preference shall not excuse a contractor from complying with the other requirements contained in this chapter.

(b) *Specific contracts and facilities*—(1) *Specific contracts.* The Director may exempt an agency or any person from requiring the inclusion of any or all of the equal opportunity clause in any specific contract or subcontract when he deems that special circumstances in the national interest so require. The Director may also exempt groups or categories of contracts or subcontracts of the same type where he finds it impracticable to act upon each request individually or where group exemptions will contribute to convenience in the administration of the order.

(2) *Facilities not connected with contracts.* The Director may exempt from the requirements of the equal op-

portunity clause any of a prime contractor's or subcontractor's facilities which he finds to be in all respects separate and distinct from activities of the prime contractor or subcontractor related to the performance of the contract, provided that he also finds that such an exemption will not interfere with or impede the effectuation of the order.

(c) *National security.* Any requirement set forth in these regulations in this part shall not apply to any contract or subcontract whenever the head of an agency determines that such contract or subcontract is essential to the national security and that its award without complying with such requirement is necessary to the national security. Upon making such a determination, the head of the agency will notify the Director in writing within 30 days.

(d) *Withdrawal of exemption.* When any contract or subcontract is of a class exempted under this section, the Director may withdraw the exemption for a specific contract or subcontract or group of contracts or subcontracts when in his judgment such action is necessary or appropriate to achieve the purposes of the order. Such withdrawal shall not apply to contracts or subcontracts awarded prior to the withdrawal, except that in procurements entered into by formal advertising, or the various forms of restricted formal advertising, such withdrawal shall not apply unless the withdrawal is made more than 10 calendar days before the date set for the opening of the bids.

§ 60-1.6 [Reserved]

§ 60-1.7 Reports and other required information.

(a) *Requirements for prime contracts and subcontractors.* (1) Each prime contractor and subcontractor shall file annually, on or before the 31st day of March,

complete and accurate reports on Standard Form 100 (EEO-1) promulgated jointly by the Office of Federal Contract Compliance Programs, the Equal Employment Opportunity Commission and Plans for Progress or such form as may hereafter be promulgated in its place if such prime contractor or subcontractor (i) is not exempt from the provisions of these regulations in accordance with § 60-1.5; (ii) has 50 or more employees; (iii) is a prime contractor or first tier subcontractor; and (iv) has a contract, subcontract or purchase order amounting to $50,000 or more or serves as a depository of Government funds in any amount, or is a financial institution which is an issuing and paying agent for U.S. savings bonds and savings notes: *Provided,* That any subcontractor below the first tier which performs construction work at the site of construction shall be required to file such a report if it meets requirements of paragraphs (a)(1)(i), (ii), and (iv) of this section.

(2) Each person required by § 60-1.7(a)(1) to submit reports shall file such a report with the contracting or administering agency within 30 days after the award to him of a contract or subcontract, unless such person has submitted such a report within 12 months preceding the date of the award. Subsequent reports shall be submitted annually in accordance with § 60-1.7(a)(1), or at such other intervals as the Director may require. The Director may extend the time for filing any report.

(3) The Director or the applicant, on their own motions, may require a contractor to keep employment or other records and to furnish, in the form requested, within reasonable limits such information as the Director or the applicant deems necessary for the administration of the order.

(4) Failure to file timely, complete and accurate reports as required constitutes noncompliance with the prime

contractor's or subcontractor's obligations under the equal opportunity clause and is ground for the imposition by the Director, an applicant, prime contractor or subcontractor, of any sanctions as authorized by the order and the regulations in this part.

(b) *Requirements for bidders or prospective contractors (1) Certification of compliance with Part 60-2: Affirmative Action Programs.* Each agency shall require each bidder or prospective prime contractor and proposed subcontractor, where appropriate, to state in the bid or in writing at the outset of negotiations for the contract: (i) Whether it has developed and has on file at each establishment affirmative action programs pursuant to Part 60-2 of this chapter; (ii) whether it has participated in any previous contract or subcontractor subject to the equal opportunity clause; (iii) whether it has filed with the Joint Reporting Committee, the Director or the Equal Employment Opportunity Commission all reports due under the applicable filing requirements.

(2) *Additional information.* A bidder or prospective prime contractor or proposed subcontractor shall be required to submit such information as the Director requests prior to the award of the contract or subcontract. When a determination has been made to award the contract or subcontract to a specific contractor, such contractor shall be required, prior to award, or after the award, or both, to furnish such other information as the applicant or the Director requests.

(c) *Use of reports.* Reports filed pursuant to this section shall be used only in connection with the administration of the order, the Civil Rights Act of 1964, or in furtherance of the purposes of the order and said Act.

§ 60-1.8 Segregated facilities.

(a) *General.* In order to comply with his obligations under the equal opportunity clause, a prime contractor or subcontractor must insure that facilities provided for employees are provided in such a manner that segregation on the basis of race, color, religion, or national origin cannot result. He may neither require such segregated use by written or oral policies nor tolerate such use by employee custom. His obligation extends further to insuring that his employees are not assigned to perform their services at any location, under his control, where the facilities are segregated. This obligation extends to all contracts containing the equal opportunity clause regardless of the amount of the contract. The term "facilities" as used in this section means waiting rooms, work areas, restaurants and other eating areas, time clocks, restrooms, wash rooms, locker rooms, and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing facilities provided for employees.

(b) *Certification by prime contractors and subcontractors.* Prior to the award of any nonexempt Government contract of subcontract or federally assisted construction contract or subcontract, each agency or applicant shall require the prospective prime contractor and each prime contractor and subcontractor shall require each subcontractor to submit a certification, in the form approved by the Director, that the prospective prime contractor or subcontractor does not and will not maintain any facilities he provides for his employees in a segregated manner, or permit his employees to perform their services at any location, under his control, where segregated facilities are maintained; and that he will obtain a similar certification in the form approved by the Director, prior to the award of any nonexempt subcontract.

§ 60-1.9 Compliance by labor unions and by recruiting and training agencies.

(a) Whenever compliance with the equal opportunity clause may necessitate a revision of a collective bargaining agreement the labor union or unions which are parties to such an agreement shall be given an adequate opportunity to present their views to the director.

(b) The Director shall use his best efforts, directly and through agencies, contractors, subcontractors, applicants, State and local officials, public and private agencies, and all other available instrumentalities, to cause any labor union, recruiting and training agency or other representative of workers who are or may be engaged in work under contracts and subcontracts to cooperate with, and to comply in the implementation of, the purposes of the order.

(c) In order to effectuate the purposes of paragraph (a) of this section, the Director may hold hearings, public or private, with respect to the practices and policies of any such labor union or recruiting and training agency.

(d) The Director may notify any Federal, State, or local agency of his conclusions and recommendations with respect to any such labor organization or recruiting and training agency which in his judgment has failed to cooperate with himself, agencies, prime contractors, subcontractors or applicants in carrying out the purposes of the order. The Director also may notify the Equal Employment Opportunity Commission, the Department of Justice, or other appropriate Federal agencies whenever he has reason to believe that the practices of any such labor organization or agency violates Title VII of the Civil Rights Act of 1964 or other provisions of Federal law.

§ 60-1.10 Foreign government practices.

Contractors shall not discriminate on the basis of race, color, religion, sex, or national origin when hiring or making employee assignments for work to be performed in the United States or abroad. Contractors are exempted from this obligation only when hiring persons outside the United States for work to be performed outside the United States (see 41 CFR 60-1.5(a)(3)). Therefore, a contractor hiring workers in the United States for either Federal or nonfederally connected work shall be in violation of Executive Order 11246, as amended, by refusing to employ or assign any person because of race, color, religion, sex, or national origin regardless of the policies of the country where the work is to be performed or for whom the work will be performed. Should any contractor be unable to acquire a visa of entry for any employee or potential employee to a country in which or with which it is doing business, and which refusal it believes is due to the race, color, religion, sex, or national origin of the employee or potential employee, the contractor must immediately notify the Department of State and the Director of such refusal.

Subpart B—General Enforcement; Compliance Review and Complaint Procedure

§ 60-1.20 Compliance reviews.

(a) The purpose of a compliance review is to determine if the prime contractor or subcontractor maintains nondiscriminatory hiring and employment practices and is taking affirmative action to insure that applicants are employed and that employees are placed, trained, upgraded, promoted, and otherwise treated during employment without regard to race, color, religion, sex, or national origin. It shall consist of a comprehensive analysis and evaluation

of each aspect of the aforementioned practices, policies, and conditions resulting therefrom. Where necessary, recommendations for appropriate sanctions shall be made.

(b) Where deficiencies are found to exist, reasonable efforts shall be made to secure compliance through conciliation and persuasion. Before the contractor can be found to be in compliance with the order, it must make a specific commitment, in writing, to correct any such deficiencies. The commitment must include the precise action to be taken and dates for completion. The time period allotted shall be no longer than the minimum period necessary to effect such changes. Upon approval, the contractor may be considered in compliance, on condition that the commitments are faithfully kept. The contractor shall be notified that making such commitments does not preclude future determinations of noncompliance based on a finding that the commitments are not sufficient to achieve compliance.

(c) [Reserved]

(d) Each agency shall include in the invitation for bids for each formally advertised nonconstruction contract or state at the outset of negotiations for each negotiated contract, that if the award, when let, should exceed the amount of $1 million or more, the prospective contractor and his known first-tier subcontractors with subcontracts of $1 million or more will be subject to a compliance review before the award of the contract. No such contract shall be awarded unless a preaward compliance review of the prospective contractor and his known first-tier $1 million subcontractors has been conducted by the compliance agency within 12 months prior to the award. The awarding agency will notify OFCCP and request appropriate action and findings in accordance with this subsection. OFCCP will provide awarding agencies with written reports of compliance within 30 days following the request. In order

to qualify for the award of a contract, a contractor and such first-tier subcontractors must be found to be in compliance pursuant to paragraph (b) of this section, and with part 60-2 of these regulations.

§ 60-1.21 Filing complaints.

Complaints shall be filed within 180 days of the alleged violation unless the time for filing is extended by the agency or the Director for good cause shown.

§ 60-122 Where to file.

Complaints may be filed with the OFCCP, 200 Constitution Avenue, N.W., Washington, D.C. 20210, or with any OFCCP regional or area office.

§ 60-1.23 Contents of complaint.

(a) The complaint shall include the name, address, and telephone number of the complainant, the name and address of the contractor or subcontractor committing the alleged discrimination, a description of the acts considered to be discriminatory, and any other pertinent information which will assist in the investigation and resolution of the complaint. The complaint shall be signed by the complainant or his/her authorized representative. Complaints alleging class-type violations which do not identify the alleged discriminatee or discriminatees will be accepted, provided the other requirements of this paragraph are met.

(b) If a complaint contains incomplete information, OFCCP shall seek the needed information from the complainant. In the event such information is not furnished to the Director within 60 days of the date of such request, the case may be closed.

§ 60-1.24 Processing of Matters.

(a) *Complaints.* OFCCP may refer appropriate complaints to the Equal Employment Opportunity Commission (EEOC) for processing until Title VII of the Civil Rights Act of 1964, as amended, rather than processing under E.O. 11246 and the regulations in this chapter. Upon referring complaints to the EEOC, OFCCP shall promptly notify complainant(s) and the contractor of such referral.

(b) *Complaint investigations.* In conducting complaint investigations, OFCCP shall, as a minimum, conduct a thorough evaluation of the allegations of the complaint and shall be responsible for developing a complete case record. The case record should contain the name, address, and telephone number of each person interviewed, the interview statements, copies, transcripts, or summaries (where appropriate) of pertinent documents, a reference to at least one covered contract, and a narrative report of the investigation with references to exhibits and other evidence which relate to the alleged violations.

(c)(1) [Reserved]

(2) If any complaint investigation or compliance review indicates a violation of the equal opportunity clause, the matter should be resolved by informal means whenever possible. Such informal means may include the holding of a compliance conference.

(3) Where any complaint investigation or compliance review indicates a violation of the equal opportunity clause and the matter has not been resolved by informal means, the Director shall proceed in accordance with § 60-1.26.

(4) When a prime contractor or subcontractor, without a hearing, shall have complied with the recommendations or orders of the Director and believes such recom-

mendations or orders to be erroneous, he shall, upon filing a request therefor within ten days of such compliance, be afforded an opportunity for a hearing and review of the alleged erroneous action.

(5) For reasonable cause shown, the Director may reconsider or cause to be reconsidered any matter on his/her own motion or pursuant to a request.

(d) *Reports to the Director.* (1) With the exception of complaints which have been referred to EEOC, within 60 days from receipt of a complaint or within such additional time as may be allowed by the Director for good cause shown the complaint shall be processed and the case record developed containing the following information:

(i) Name and address of the complainant;

(ii) Brief summary of findings including a statement regarding the contractor's compliance or noncompliance with the requirements of the equal opportunity clause;

(iii) A statement of the disposition of the case, including any corrective action taken and any sanctions or penalties imposed or, whenever appropriate, the recommended corrective action and sanctions or penalties.

(2) A written report of every preaward compliance review required by this regulation or otherwise required by the Director, shall be developed and maintained.

(3) A written report of every other compliance review or any other matter processed involving an apparent violation of the equal opportunity clause shall be made. Such report shall contain a brief summary of the findings, including a statement of conclusions regarding the contractor's compliance or noncompliance with the requirements of the order, and a statement of the disposition of the

case, including any corrective action taken or recommended and any sanctions or penalties imposed or recommended.

§ 60-1.25 Assumption of jurisdiction by or referrals to the Director.

The Director may inquire into the status of any matter pending before an agency. Where he considers it necessary or appropriate to the achievement of the purposes of the order, he may assume jurisdiction over the matter and proceed as provided herein. Whenever the Director assumes jurisdiction over any matter, or an agency refers any matter he may conduct, or have conducted, such investigations, hold such hearings, make such findings, issue such recommendations and directives, order such sanctions and penalties, and take such other action as may be necessary or appropriate to achieve the purposes of the order. The Director shall promptly notify the agency of any corrective action to be taken or any sanctions to be taken or any sanction to be imposed by the agency. The agency shall take such action, and report the results thereof to the Director within the time specified.

§ 60-1.26 Enforcement proceedings.

(a) *General* Violations of the Order, equal opportunity clause, the regulations in this chapter, or of applicable construction industry equal employment opportunity requirements, may result in the institution of administrative or judicial enforcement proceedings to enforce the Order and to seek appropriate relief. Violations may be found based upon, inter alia, any of the following: (i) The results of a complaint investigation; (ii) analysis of an affirmative action program; (iii) the results of an on-site review of the contractor's compliance with the Order and its implementing regulations; (iv) a contractor's refusal to

submit an affirmative action program; (v) a contractor's refusal to allow an on-site compliance review to be conducted; (vi) a contractor's refusal to supply records or other information as required by these regulations or applicable construction industry requirements; or (vii) any substantial or material violation or the threat of a substantial or material violation of contractual provisions of the Order, or of the rules or regulations issued pursuant thereto.

(2) If the investigation of a complaint, or a compliance review, results in a determination that the Order, equal opportunity clause or regulations issued pursuant thereto, have been violated, and the violations have not been corrected in accordance with the conciliation procedures in this chapter, OFCCP may institute an administrative enforcement proceeding to enjoin the violations, to seek appropriate relief (which may include affected class and back pay relief), and to impose appropriate sanctions, or any of the above. However, if the contractor refuses to submit an affirmative action program, or refuses to supply records or other requested information, or refuses to allow the compliance agency access to its premises for an on-site review; and if conciliation efforts under this chapter are unsuccessful, OFCCP, notwithstanding the requirements of this chapter, may go directly to administrative enforcement proceedings to enjoin the violations, to seek appropriate relief, and to impose appropriate sanctions, or any of the above. Whenever the Director has reason to believe that there is substantial or material violation or the threat of substantial or material violation of the contractual provisions of the Order or of the rules, regulations or orders issued pursuant thereto, he/she to enforce the contractual provisions may refer the matter to the Solicitor of Labor to institute administrative of the Order, to seek injunctive relief (includ-

ing relief against noncontractors, enforcement proceedings as set including labor unions, who seek forth in this section or refer the matter to the Department of Justice to thwart implementation of the Order and regulations) and to seek such additional relief, including back pay, as may be appropriate. There are no procedural prerequisites to a referral to the Department of Justice by the Director, and such referrals may be accomplished without proceeding through the conciliation procedures in under this chapter: *Provided,* That no order for debarment from further contracts or subcontracts pursuant to section 209(a)(6) of the Order shall be made without affording the contractor an opportunity for a hearing, either administrative or judicial. [As last amended by 45 FR 9271, effective February 12, 1980]

(b) [Reserved]

(c) *Administrative enforcement proceedings.* Administrative enforcement proceedings shall be conducted under the control and supervision of the Solicitor of Labor and under the Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity Under Executive Order 11246 contained in Part 60-30 of this chapter.

(d) *Decision following administrative proceeding:* If it is determined after a hearing (or after the contractor waives a hearing) that the contractor is violating the Order or the regulations issued thereunder, the Secretary (in accordance with 41 CFR 60-30.30(a)) shall issue an Administrative Order enjoining the violations and requiring the contractor to provide whatever remedies are appropriate, and imposing whatever sanctions are appropriate, or any of the above. In any event, failure to comply with the Administrative Order shall result in the imposition of the sanctions contained in section 209 (a)(5) or (a)(6) of the Executive Order.

(e) *Referrals to the Department of Justice* (1) Whenever a matter has been referred to the Department of Justice for consideration of judicial proceedings pursuant to § 60-1.26(a)(2) of these regulations, the Attorney appropriate district court of the appropriate district court of the United States requesting a temporary restraining order, preliminary or permanent injunction, and an order for such additional equitable relief, including back pay, deemed necessary or appropriate to ensure the full enjoyment of the rights secured by the Order, or any of the above.

(2) The Attorney General is authorized to conduct such investigation of the facts as he may deem necessary or appropriate to carry out his responsibilities under these regulations.

(3) Prior to the institution of any judicial proceedings, the Attorney General, on behalf of the Director, is authorized to make reasonable efforts to secure compliance with the contract provisions of the Order. He may do so by providing the contractor and any other respondent with reasonable notice of his findings, his intent to file suit, and the actions he believes necessary to obtain compliance with the contract provisions of the Order without contested litigation, and by offering the contractor and any other respondent a reasonable opportunity for conference and conciliation, in an effort to obtain such compliance without contested litigation.

(4) As defined in these regulations the Attorney General shall mean the Attorney General, the Assistant Attorney General for Civil Rights, or any other person authorized by regulations or practice to act for the Attorney General with respect to the enforcement of equal employment opportunity laws, order and regulations generally, or in a particular matter or case.

(5) The Director or his/her designee, and representatives of the Attorney General may consult from time to time to determine what investigations should be conducted to determine whether contractors or groups of contractors or other persons may be engaged in patterns or practices in violation of the Executive Order or these regulations, or of resistance to or interference with the full enjoyment of any of the rights secured by them, warranting judicial proceedings.

(f) *Initiation of lawsuits by the Attorney General without referral from the Director.* In addition to initiating lawsuits upon referral under 41 CFR 60-1.26, the Attorney General may, subject to approval by the Director, initiate independent investigations of contractors which he/she has reason to believe may be in violation of the Order or the rules and regulations issued pursuant thereto. If upon completion of such an investigation, the Attorney General determines that the contractor has in fact violated the Order or the rules and regulations issued thereunder, he shall make reasonable efforts to secure compliance with the contract provisions of the Order. He may do so by providing the contractor and any other respondent with reasonable notice of the Department's findings, its intent to file suit, and the actions that the Attorney General believes are necessary to obtain compliance with the contract provisions of the Order without contested litigation, and by offering the contractor and any other respondent a reasonable opportunity for conference and conciliation in an effort to obtain such compliance without contested litigation. If these efforts are unsuccessful, the Attorney General may, upon approval by the Director, bring a civil action in the appropriate district court of the United States requesting a temporary restraining order, preliminary or permanent injunction, and an order for such additional

equitable relief, including back pay, deemed necessary or appropriate to ensure the full enjoyment of the rights secured by the Order or any of the above.

(g) To the extent applicable, this section and Part 60-30 of this chapter shall govern proceedings resulting from the Director's determination under § 60-2.2(b) that there are substantial issues of law or fact as to the contractor/bidder's responsibility.

§ 60-1.27 Sanctions and penalties.

The sanctions described in subsections (1), (5), and (6) of section 209(a) of the order may be exercised only by or with the approval of the Director. Referral of any matter arising under the order to the Department of Justice or to the Equal Employment Opportunity Commission shall be made by the Director.

§ 60-1.28 Show cause notices.

When the director has reasonable cause to believe that a contractor has violated the equal opportunity clause he may issue a notice requiring the contractor to show cause within 30 days, why monitoring, enforcement proceedings or other appropriate action to ensure compliance should not be instituted.

§ 60-1.29 Preaward notices.

(a) *Preaward compliance reviews.* Upon request of the Director, agencies shall not enter into contracts or approve the entry into contracts or subcontracts wih any bidder, prospective prime contractor, or proposed subcontractor named by the Director until a preaward compliance review has been conducted and the Director or his designee has approved a determination that the bidder,

prospective prime contractor or proposed subcontractor will be able to comply with the provisions of the equal opportunity clause.

(b) *Other special preaward procedures.* Upon the request of the Director, agencies shall not enter into contracts or approve the entry into subcontracts with any bidder; prospective prime contractor or proposed subcontractor specified by the Director until the agency has complied with the directions contained in the request.

§ 60-1.30 Contract ineligibility list.

The Director shall distribute periodically a list to all executive departments and agencies giving the names of prime contractors and subcontractors who have been declared ineligible under the regulations in this part and the order.

§ 60-1.31 Reinstatement of ineligible prime contractors and subcontractors.

Any prime contractor or subcontractor declared ineligible for further contracts or subcontracts under the order may request reinstatement in a letter directed to the Director. In connection with the reinstatement proceedings, the prime contractor or subcontractor shall be required to show that it has established and will carry out employment policies and practices in compliance with the equal opportunity clause.

§ 60-1.32 Intimidation and interference.

The sanctions and penalties contained in Subpart D of the order may be exercised by the Director against any prime contractor, subcontractor or applicant who fails to take all necessary steps to ensure that no person intimidates, threatens, coerces, or discriminates against any indi-

vidual for the purpose of interfering with the filing of a complaint, furnishing information, or assisting or participating in any manner in an investigation, compliance review, hearing, or any other activity related to the administration of the order or any other Federal, State, or local laws requiring equal employment opportunity.

§ 60-1.33 Conciliation agreements.

(a) If a compliance review, complaint investigation or other review by OFCCP or its representative indicates a material violation of the equal opportunity clause, and (1) if the contractor, subcontractor or bidder is willing to correct the violations and/or deficiencies, and (2) if OFCCP or its representative determines that settlement (rather than referral for consideration of formal enforcement) is appropriate, a written agreement shall be required. The agreement shall provide for such remedial action as may be necessary to correct the violations and/or deficiencies noted, including, where appropriate (but not necessarily limited to), remedies such as back pay and retroactive seniority.

(b) The term "conciliation agreement" does not include "letters of commitment" which are appropriate for resolving minor technical deficiencies.

§ 60-1.34 Violation of a conciliation agreement or letter of commitment.

(a) When a conciliation agreement has been violated, the following procedures are applicable:

(1) A written notice shall be sent to the contractor setting forth the violations alleged and summarizing the supporting evidence. The contractor shall have 15 days from receipt of the notice to respond, except in those cases in which such a delay would result in irreparable

injury to the employment rights of affected employees or applicants.

During the 15-day period the contractor may demonstrate in writing that it has not violated its commitments.

(3) If the contractor is unable to demonstrate that it has not violated its commitments, or if the complaint alleges irreparable injury, enforcement proceedings may be initiated immediately without issuing a show cause notice or proceeding through any other requirement contained in this chapter.

(b) If the contractor has violated a letter of commitment, the matter shall be handled, where appropriate, pursuant to 41 CFR 60-2.2(c) or 41 CFR 60-4.8. The violation may be corrected through a conciliation agreement, or an enforcement proceeding may be initiated.

Subpart C—Ancillary Matters

§ 60-1.40 Affirmative action compliance programs.

(a) *Requirements of programs.* Each contractor who has 50 or more employees and (1) has a contract of $50,000 or more; or (2) has Government bills of lading which in any 12-month period, total or can reasonably be expected to total $50,000 or more; or (3) serves as a depository of Government funds in any amount; or (4) is a financial institution which is an issuing and paying agent for U.S. savings bonds and savings notes in any amount, and each prime contractor and subcontractor shall require each subcontractor who has 50 or more employees and (i) has a subcontract of $50,000 or more; or (ii) has Government bills of lading which in any 12-month period, total or can reasonably be expected total $50,000 or more; or (iii) serves as a depository of Government funds in any amount; or (iv) is a financial institution which is an issuing and

paying agent for U.S. savings bonds and savings notes in any amount, to develop a written affirmative action compliance program for each of its establishments. A necessary prerequisite to the development of a satisfactory affirmative action program is the identification and analysis of problem areas inherent in minority employment and an evaluation of opportunities for utilization of minority group personnel. The contractor's program shall provide in detail for specific steps to guarantee equal employment opportunity keyed to the problems and needs of members of minority groups, including, when there are deficiencies, the development of specific goals and time tables for the prompt achievement of full and equal employment opportunity. Each contractor shall include in its affirmative action compliance program a table of job classifications. This table should include but need not be limited to job titles, principal duties (and auxiliary duties, if any), rates of pay, and where more than one rate of pay applied (because of length of time in the job or other factors), the applicable rates. The affirmative action compliance program shall be signed by an executive official of the contractor.

(b) *Utilization evaluation.* The evaluation of utilization of minority group personnel shall include the following:

(1) An analysis of minority group representation in all job categories.

(2) An analysis of hiring practices for the past year, including recruitment sources and testing, to determine whether equal employment opportunity is being afforded in all job categories.

(3) An analysis of upgrading, transfer and promotion for the past year to determine whether equal employment opportunity is being afforded.

(c) *Maintenance of programs.* Within 120 days from the commencement of the contract, each contractor shall maintain a copy of separate affirmative action compliance programs for each establishment, including evaluations of utilization of minority group personnel and the job classification tables, at each local office responsible for the personnel matters of such establishment. An affirmative action compliance program shall be part of the manpower and training plans for each new establishment and shall be developed and made available prior to the staffing of such establishment. A report of the results of such program shall be compiled annually and the program shall be updated at that time. This information shall be made available to representatives of the Director upon request and the contractor's affirmative action program and the result it produces shall be evaluated as part of compliance review activities.

§ 60-1.14 Solicitations or advertisements for employees.

In solicitations or advertisements for employees placed by or on behalf of a prime contractor or subcontractor, the requirements of paragraph (2) of the equal opportunity clause shall be satisfied whenever the prime contractor or subcontractor complies with any of the following:

(a) States expressly in the solicitations or advertising that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin;

(b) Uses display or other advertising, and the advertising includes an appropriate insignia prescribed by the Director. The use of the insignia is considered subject to the provisions of 18 U.S.C. 701;

(c) Uses a single advertisement, and the advertisement is grouped with other advertisements under a caption

which clearly states that all employers in the group assure all qualified applicants equal consideration for employment without regard to race, color, religion, sex, or national origin;

(d) Uses a single advertisement in which appears in clearly distinguishable type the phrase "an equal opportunity employer."

§ 60-1.42 Notices to be posted.

(a) Unless alternative notices are prescribed by the Director, the notices which prime contractors and subcontractors are required to post by paragraphs (1) and (3) of the equal opportunity clause will contain the following language and will be provided by the contracting or administering agencies:

Equal Employment Opportunity Is the Law—Discrimination Is Prohibited by the Civil Rights Act of 1964 and by Executive Order No. 11246

Title VII of the Civil Rights Act of 1964—*Administered by:*

The Equal Employment Opportunity Commission

Prohibits discrimination because of Race, Color, Religion, Sex, or National Origin by Employers with 75 or more employees, by Labor Organiaztions with a hiring hall of 75 or more members, by Employment Agencies, and by Joint Labor-Management Committees for Apprenticeship or Training. After July 1, 1967, employers and labor organizations with 50 or more employees or members will be covered; after July 1, 1968, those with 25 or more will be covered.

Any Person
Who believes he or she has been
discriminated against
Should Contact

The Equal Employment Opportunity
Commission
2401 E Street NW, Washington, D.C.
20506

Executive Order No. 11246—
Administered by:

The Office of Federal Contract
Compliance Programs

Prohibits discrimination because of Race, Color, Religion, Sex, or National Origin, and requires affirmative acton to ensure equalty of opportunity in all aspects of employment.

By all Federal Government Contractors and Subcontractors, and by Contractors Performing Work Under a Federal Assisted Construction Contract, regardless of the number of employees in either case.

Any Person
Who believes he or she has been
discriminated against
Should Contact

The Office of Federal Contract
Compliance Programs
U.S. Department of Labor Washington, D.C. 20210

(b) The requirements of paragraph (3) of the equal opportunity clause will be satisfied whenever the prime contractor or subcontractor posts copies of the notification prescribed by or pursuant to paragraph (a) of this section in conspicuous places available to employees, applicants for employment, and representatives of each labor union

or other organization representing his employees with which he has a collective-bargaining agreement or other contract or understanding.

§ 60-1.43 Access to records and site of employment.

Each prime contractor and subcontractor shall permit access during normal business hours to its premises for the purpose of conducting on-site compliance reviews and inspecting and copying such books, records, accounts, and other material as may be relevant to the matter under investigation and pertinent to compliance with the Order, and the rules and regulations promulgated pursuant thereto by the agency, or the Director. Information obtained in this manner shall be used only in connection with the administration of the Order, the administration of the Civil Rights Act of 1964 (as amended) and in furtherance of the purposes of the Order and that Act. (See 41 CFR Part 60-80, Contractor Evaluation Procedures for Nonconstruction Contractors; 41 CFR Part 60-40. Examination and Copying of OFCCP Documents.)

(Sec. 201. E.O. 11246, 30 RF 12319, and E.O. 11375, 32 FR 14303)

§ 60-144 Rulings and interpretations.

Rulings under or interpretations of the order or the regulations contained in this part shall be made by the Secretary or his designee.

§ 60-1.45 Existing contracts and subcontracts.

All contracts and subcontracts in effect prior to October 24, 1965, which are not subsequently modified shall be administered in accordance with the nondiscrimination provisions of any prior applicable Executive orders. Any contract or subcontract modified on or after October 24,

1965, shall be subject to Executive Order 11246. Complaints received by and violations coming to the attention of agencies regarding contracts and subcontracts which were subject to Executive Orders 10925 and 11114 shall be processed as if they were complaints regarding violations of this order.

§ 60-1.46 Delegation of authority by the Director.

The Director is authorized to redelegate the authority given to him by the regulations in this part. The authority redelegated by the Director pursuant to the regulations in this part shall be exercised under his general direction and control.

§ 60-1.47 Effective date.

The regulations contained in this part shall become effective July 1, 1968, for all contracts, the solicitations, invitations for bids, or requests for proposals which were sent by the Government or an applicant on or after said effective date, and for all negotiated contracts which have not been executed as of said effective date. Notwithstanding the foregoing, the regulations in this part shall become effective as to all contracts executed on and after the 120th day following said effective date. Subject to any prior approval of the Secretary, any agency may defer the effective date of the regulations in this part, for such period of time as the Secretary finds to be reasonably necessary. Contracts executed prior to the effective date of the regulations in this part shall be governed by the regulations promulgated by the former President's Committee on Equal Employment Opportunity which appear at 28 FR 9812, September 2, 1963, and at 28 FR 11305, October 23, 1963, the temporary regulations which appear at 30 FR 13441, October 22, 1965, and the orders at 31 FR 6881, May 10, 1966, and 32 FR 7439, May 19, 1967.

APPENDIX F

AN ACT

To simplify the procurement, utilization, and disposal of Government property, to reorganize certain agencies of the Government, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

That this Act may be cited as the "Federal Property and Administrative Services Act of 1949".

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DECLARATIONS OF POLICY

SEC. 2. It is the intent of the Congress in enacting this legislation to provide for the Government an economical and efficient system for (a) the procurement and supply of personal property and nonpersonal services, including related functions such as contracting, inspection, storage, issue, specifications, property identification and classification, transportation and traffic management, management of public utility services, repairing and converting establishment of inventory levels, establishment of forms and procedures, and representation before Federal and State regulatory bodies; (b) the utilization of available property; (c) the disposal of surplus property; and (d) records management.

DEFINITIONS

SEC. 3. As used in this Act—

(a) The term "executive agency" means any executive department or independent establishment in the executive branch of the Government, including any wholly owned Government corporation.

(b) The term "Federal agency" means any executive agency or any establishment in the legislative or judicial branch of the Government (except the Senate and the House of Representatives).

(c) The term "Administrator" means the Administrator of General Services provided for in title I hereof.

(d) The term "property" means any interest in property of any kind except (1) the public domain and lands reserved or dedicated for national forest or national park purposes; and (2) naval vessels of the following categories: Battleships, cruisers, aircraft carriers, destroyers, and submarines.

(e) The term "excess property" means any property under the control of any Federal agency which is not required for its needs and the discharge of its responsibilities, as determined by the head thereof.

(f) The term "foreign excess property" means any excess property located outside the continental United States, Hawaii, Alaska, Puerto Rico, and the Virgin Islands.

(g) The term "surplus property" means any excess property not required for the needs and the discharge of the responsibilities of all Federal agencies, as determined by the Administrator.

(h) The term "care and handling" includes completing, repairing, converting, rehabilitating, operating, pre-

serving, protecting, insuring, packing, storing, handling, conserving, and transporting excess and surplus property, and, in the case of property which is dangerous to public health or safety, destroying or rendering innocuous such property.

(i) The term "person" includes any corporation, partnership, firm, association, trust, estate, or other entity.

(j) The term "nonpersonal services" means such contractual services, other than personal and professional services, as the Administrator shall designate.

(k) The term "contractor inventory" means (1) any property acquired by and in the possession of a contractor or subcontractor under a contract pursuant to the terms of which title is vested in the Government, and in excess of the amounts needed to complete full performance under the entire contract; and (2) any property which the Government is obligated to take over under any type of contract as a result either of any changes in the specifications or plans thereunder or of the termination of such contract (or subcontract thereunder), prior to completion of the work, for the convenience or at the option of the Government.

TITLE I—ORGANIZATION

GENERAL SERVICES ADMINISTRATION

SEC. 101. (a) There is hereby established an agency in the executive branch of the Government which shall be known as the General Services Administration.

(b) There shall be at the head of the General Services Administration an Administrator of General Services who shall be appointed by the President by and with the advice and consent of the Senate, and perform his functions subject to the direction and control of the President.

(c) There shall be in the General Services Administration a Deputy Administrator of General Services who shall be appointed by the Administrator of General Services. The Deputy Administrator shall perform such functions as the Administrator shall designate and shall be Acting Administrator of General Services during the absence or disability of the Administrator and, unless the President shall designate another officer of the Government, in the event of a vacancy in the office of Administrator.

* * *

TRANSFER OF AFFAIRS OF BUREAU OF FEDERAL SUPPLY

SEC. 102. (a) The functions of (1) the Bureau of Federal Supply in the Department of the Treasury, (2) the Director of the Bureau of Federal Supply, (3) the personnel of such Bureau, and (4) the Secretary of the Treasury, relating to the Bureau of Federal Supply, are hereby transferred to the Administrator.

* * *

TRANSFER OF AFFAIRS OF THE FEDERAL WORKS AGENCY

SEC. 103. (a) All functions of the Federal Works Agency and of all agencies thereof, together with all functions of the Federal Works Administrator, of the Commissioner of Public Buildings, and of the Commissioner of Public Roads, are hereby transferred to the Administrator of General Services.

* * *

RECORDS MANAGEMENT: TRANSFER OF THE NATIONAL ARCHIVES

SEC. 104. (a) The National Archives Establishment and its functions, records, property, personnel, obligations, and commitments are hereby transferred to the General Services Administration. There are transferred to the

* * *

TRANSFER FOR LIQUIDATION OF THE AFFAIRS OF THE WAR ASSETS ADMINISTRATION

SEC. 105. The functions, records, property, personnel, obligations, and commitments of the War Assets Administration are hereby transferred to the General Services Administration.

* * *

REDISTRIBUTION OF FUNCTIONS

SEC. 106. The Administrator is hereby authorized, in his discretion, in order to provide for the effective accomplishment of the functions transferred to or vested in him by this Act, and from time to time, to regroup, transfer, and distribute any such functions within the General Services Administration. The Administrator is hereby authorized to transfer the funds necessary to accomplish said functions and report such transfers of funds to the Director of the Bureau of the Budget.

TRANSFER OF FUNDS

SEC. 107. (a) All unexpended balances of appropriations, allocations, or other funds available * * *

by the provisions of this Act, shall be transferred to the General Services Administration for use in connection with the functions to which such balances relate, respectively.

* * *

STATUS OF TRANSFERRED EMPLOYEES

SEC. 108. Subject to other provisions of this title relating to personnel, employees transferred by the provisions of this title shall be deemed to be employees of the General Services Administration and their reappointment shall not be required by reason of the enactment of this Act.

GENERAL SUPPLY FUND

SEC. 109. (a) There is hereby authorized to be set aside in the Treasury a special fund which shall be known as the General Supply Fund.

* * *

TITLE II—PROPERTY MANAGEMENT

PROCUREMENT, WAREHOUSING, AND RELATED ACTIVITIES

SEC. 201. (a) The Administrator shall, in respect of executive agencies, and to the extent that he determines that so doing is advantageous to the Government in terms of economy, efficiency, or service, and with due regard to the program activities of the agencies concerned—

(1) prescribe policies and methods of procurement and supply of personal property and nonpersonal services, including related functions such as contracting, inspection, storage, issue, property identification and classification, transportation and traffic management, management of public utility services, and repairing and converting; and

(2) operate, and, after consultation with the executive agencies affected, consolidate, take over, or arrange for the operation by any executive agency of warehouses, supply centers, repair shops, fuel yards, and other similar facilities; and

(3) procure and supply personal property and nonpersonal services for the use of executive agencies in the proper discharge of their responsibilities, and perform functions related to procurement and supply such as those mentioned above in subparagraph (1): *Provided*, That contracts for public utility services may be made for periods not exceeding ten years; and

(4) with respect to transportation and other public utility services for the use of executive agencies, represent such agencies in negotiations with carriers and other public utilities and in proceedings involving carriers or other public utilities before Federal and State regulatory bodies;

* * *

PROPERTY UTILIZATION

SEC. 202. (a) In order to minimize expenditures for property, the Administrator shall prescribe policies and methods to promote the maximum utilization of excess property by executive agencies, and he shall provide for the transfer of excess property among Federal agencies.

(b) Each executive agency shall (1) maintain adequate inventory controls and accountability systems for the property under its control, (2) continuously survey property under its control to determine which is excess property, and promptly report such property to the Administrator, (3) perform the care and handling of such excess property, and (4) transfer or dispose of such property as promptly as possible in accordance with authority delegated and regulations prescribed by the Administrator.

* * *

DISPOSAL OF SURPLUS PROPERTY

SEC. 203. (a) Except as otherwise provided in this section, the Administrator shall have supervision and direction over the disposition of surplus property. Such property shall be disposed of to such extent, at such time, in such areas, by such agencies, at such terms and conditions, and in such manner, as may be prescribed in or pursuant to this Act.

(b) The care and handling of surplus property, pending its disposition, and the disposal of surplus property, may be performed by the General Services Administration or, when so determined by the Administrator, by the executive agency in possession thereof or by any other executive agency consenting thereto.

* * *

PROCEEDS FROM TRANSFER OR DISPOSITION OF PROPERTY

SEC. 204. (a) All proceeds under this title from any transfer of excess property to a Federal agency for its use, or from any sale, lease, or other disposition of surplus property, shall be covered into the Treasury as miscellaneous receipts, except as provided in subsections (b), (c), (d), and (e) of this section.

* * *

POLICIES, REGULATIONS, AND DELEGATIONS

SEC. 205. (a) The President may prescribe such policies and directives, not inconsistent with the provisions

of this Act, as he shall deem necessary to effectuate the provisions of this Act, which policies and directives shall govern the Administrator and executive agencies in carrying out their respective functions hereunder.

(b) The Comptroller General after considering the needs and requirements of the executive agencies shall prescribe principles and standards of accounting for property, cooperate with the Administrator and with the executive agencies in the development of property accounting systems, and approve such systems when deemed to be adequate and in conformity with prescribed principles and standards. From time to time the General Accounting Office shall examine such property accounting systems as are established by the executive agencies to determine the extent of compliance with prescribed principles and standards and approved systems, and the Comptroller General shall report to the Congress any failure to comply with such principles and standards or to adequately account for property.

(c) The Administrator shall prescribe such regulations as he deems necessary to effectuate his functions under this Act, and the head of each executive agency shall cause to be issued such orders and directives as such head deems necessary to carry out such regulations.

(d) The Administrator is authorized to delegate and to authorize successive redelegation of any authority transferred to or vested in him by this Act (except for the authority to issue regulations on matters of policy having application to executive agencies, the authority contained in section 106, and except as otherwise provided in this Act) to any official in the General Services Administration or to the head of any other Federal agency.

(e) With respect to any function transferred to or vested in the General Services Administration or the Administrator by this Act, the Administrator may (1) direct the undertaking of its performance by the General Services Administration or by any constituent organization therein which he may designate or establish; or (2) designate and authorize any executive agency to perform such function for itself; or (3) designate and authorize any other executive agency to perform such function; or (4) provide for such performance by any combination of the foregoing methods. Any designation or assignment of functions or delegation of authority to another executive agency under this section shall be made only with the consent of the executive agency concerned or upon direction of the President.

(f) When any executive agency (including the General Services Administration and constituent organizations thereof) is authorized and directed by the Administrator to carry out any function under this Act, the Administrator may, with the approval of the Director of the Bureau of the Budget, provide for the transfer of appropriate personnel, records, property, and allocated funds of the General Services Administration, or of such other executive agency as has theretofore carried out such function, to the executive agency so authorized and directed.

(g) The administrator may establish advisory committees to advise with him with respect to any function transferred to or vested in the Administrator by this Act. The members thereof shall serve without compensation but shall be entitled to transportation and not to exceed $25 per diem in lieu of subsistence, as authorized by section 5 of the Act of August 2, 1946 (5 U.S.C. 73b-2), for persons so serving.

(h) The Administrator shall advise and consult with interested Federal agencies with a view to obtaining their advice and assistance in carrying out the purposes of this title.

SURVEYS, STANDARDIZATION AND CATALOGING

SEC. 206. (a) As he may deem necessary for the effectuation of his functions under this title, and after adequate advance notice to the executive agencies affected, and with due regard to the requirements of the National Military Establishment as determined by the Secretary of Defense, the Administrator is authorized (1) to make surveys of Government property and property management practices and obtain reports thereon from executive agencies; (2) to cooperate with executive agencies in the establishment of reasonable inventory levels for property stocked by them and from time to time report any excessive stocking to the Congress and to the Director of the Bureau of the Budget; (3) to establish and maintain such uniform Federal supply catalog system as may be appropriate to identify and classify personal property under the control of Federal agencies . . .

* * *

APPLICABILITY OF ANTITRUST LAWS

SEC. 207. Whenever any executive agency shall begin negotiations for the disposition to private interests of a plant or plants, or other property, which cost the Government $1,000,000 or more, or of patents, processes, techniques, or inventions, irrespective of cost, the executive agency shall promptly notify the Attorney General of the proposed disposal and the probable terms or conditions thereof. . . . Nothing in this Act shall impair, amend, or modify the antitrust laws or limit and prevent their

application to persons who buy or otherwise acquire property under the provisions of this Act.

EMPLOYMENT OF PERSONNEL

SEC. 208. (a) The Administrator is authorized, subject to the civil-service and classification laws, to appoint and fix the compensation of such personnel as may be necessary to carry out the provisions of titles I, II, III, and V of this Act.

* * *

CIVIL REMEDIES AND PENALTIES

SEC. 209. (a) Where any property is transferred or disposed of in accordance with this Act and any regulations prescribed hereunder, no officer or employee of the Government shall (1) be liable with respect to such transfer or disposition except for his own fraud, or (2) be accountable for the collection of any purchase price for such property which is determined to be uncollectible by the Federal agency responsible therefor.

(b) Every person who shall use or engage in, or cause to be used or engaged in, or enter into an agreement, combination, or conspiracy to use or engage in or to cause to be used or engaged in, any fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States or any Federal agency in connection with the procurement, transfer, or disposition of property hereunder—

(1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the cost of suit; or

(2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by the United States or any Federal agency to such person or by such person to the United States or any Federal agency, as the case may be; or

(3) shall, if the United States shall so elect, restore to the United States the money or property thus secured and obtained and the United States shall

retain as liquidated damages any property, money, or other consideration given to the United States or any Federal agency for such money or property, as the case may be.

(c) The several district courts of the United States, the District Court of the United States for the District of Columbia, and the several district courts of the Territories and possessions of the United States, within whose jurisdictional limits the person, or persons, doing or committing such act, or any one of them, resides or shall be found, shall wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit, and such person or persons as are not inhabitants of or found within the district in which suit is brought may be brought in by order of the court to be served personally or by publication or in such other reasonable manner as the court may direct.

(d) The civil remedies provided in this section shall be in addition to all other criminal penalties and civil remedies provided by law.

REPORTS TO CONGRESS

SEC. 210. The Administrator shall submit a report to the Congress, in January of each year and at such other times as he may deem it desirable, regarding the administration of his functions under this Act, together with such recommendations for amendments to this Act as he may deem appropriate as the result of the administration of such functions, at which time he shall also cite the laws becoming obsolete by reason of passage or operation of the provisions of this Act.

TITLE III—PROCUREMENT PROCEDURE

DECLARATION OF PURPOSE

SEC. 301. The purpose of this title is to facilitate the procurement of supplies and services.

APPLICATION AND PROCUREMENT METHODS

SEC. 302. (a) The provisions of this title shall be applicable to purchases and contracts for supplies or services made—

(1) by the General Services Administration for the use of such agency or otherwise; and

(2) by any other executive agency (except any agency named in section 2 (a) of the Armed Services Procurement Act of 1947), to the extent of and in conformity with authority delegated by the Administrator pursuant to the provisions of this subsection.

* * *

(b) It is the declared policy of the Congress that a fair proportion of the total purchases and contracts for supplies and services for the Government shall be placed with small-business concerns.

(c) All purchases and contracts for supplies and services shall be made by advertising, as provided in section 303, except that such purchases and contracts may be negotiated by the agency head without advertising if—

* * *

ADVERTISING REQUIREMENTS

SEC. 303. Whenever advertising is required—

(a) The advertisement for bids shall be made a sufficient time previous to the purchase or contract, and specifications and invitations for bids shall permit such full and free competition as is consistent with the procurement of types of supplies and services necessary to meet the requirements of the agency concerned.

* * *

REQUIREMENTS OF NEGOTIATED CONTRACTS

SEC. 304. (a) Except as provided in subsection (b) of this section, contracts negotiated pursuant to section 302 (c) may be of any type which in the opinion of the agency head will promote the best interests of the Government. . .

(b) The cost-plus-a-percentage-of-cost system of contracting shall not be used, and in the case of a cost-plus-a-fixed-fee contract the fee shall not exceed 10 per centum of the estimated cost of the contract.

* * *

ADVANCE PAYMENTS

SEC. 305. (a) The agency head may make advance payments under negotiated contracts heretofore or hereafter executed in any amount not exceeding the contract price upon such terms as the parties shall agree.

* * *

WAIVER OF LIQUIDATED DAMAGES

SEC. 306. Whenever any contract made on behalf of the Government by the agency head or by officers authorized by him so to do includes a provision for liquidated damages for delay, the Comptroller General on the recommendation of the agency head is authorized and impowered to remit the whole or any part of such damages as in his discretion may be just and equitable.

ADMINISTRATIVE DETERMINATIONS AND DELEGATIONS

SEC. 307. (a) The determinations and decisions provided in this title to be made by the Administrator or other agency head may be made with respect to individual purchases and contracts or with respect to classes of purchases or contracts, and shall be final.

* * *

STATUTES CONTINUED IN EFFECT

SEC. 308. No purchase or contract shall be exempt from the Act of June 30, 1936 (49 Stat. 2036, as amended; 41 U. S. C. 35 to 45), or from the Act of March 3, 1931 (46 Stat. 1494, as amended; 40 U. S. C. 276a to 276a-6), solely by reason of having been entered into pursuant to section 302 (c) hereof without advertising, and the provisions of said Acts and of the Act of June 19, 1912 (37 Stat. 137, as amended; 40 U. S. C. 324 and 325a), if otherwise applicable, shall apply to such purchases and contracts.

DEFINITIONS

SEC. 309. As used in this title—

(a) The term "agency head" shall mean the head or any assistant head of any executive agency, and may at the option of the Administrator include the chief official of any principal organizational unit of the General Services Administration.

(b) The term "supplies" shall mean all property except land, and shall include, by way of description and without limitation, public works, buildings, facilities, ships, floating equipment, and vessels of every character, type and description (except the categories of naval vessels named in section 3 (d)), aircraft, parts, accessories, equipment, machine tools and alteration or installation thereof.

STATUTES NOT APPLICABLE

SEC. 310. The following provisions of law shall not apply to the procurement of supplies or services (1) by the General Services Administration, or (2) within the scope of authority delegated by the Administrator to any other executive agency:

Revised Statutes, section 3709, as amended (41 U. S. C. 5);

Revised Statutes, section 3735 (41 U. S. C. 13);

Sections 1 and 2 of the Act of October 10, 1940 (54 Stat. 1109, as amended; 41 U. S. C. 6 and 6a).

TITLE IV—FOREIGN EXCESS PROPERTY

DISPOSAL OF FOREIGN EXCESS PROPERTY

SEC. 401. Each executive agency having foreign excess property shall be responsible for the disposal thereof. . . . excess property in effect on the effective date of this Act.

METHODS AND TERMS OF DISPOSAL

SEC. 402. Foreign excess property may be disposed of (a) by sale, exchange, lease, or transfer, for cash, credit, or other property, with or without warranty, and upon such other terms and conditions as the head of the executive agency concerned deems proper.

* * *

PROCEEDS, FOREIGN CURRENCIES

SEC. 403. Proceeds from the sale, lease, or other disposition of foreign excess property, (a) shall, if in the form of foreign currencies or credits, be administered in accordance with procedures that may from time to time be established by the Secretary of the Treasury, and (b) shall, if in United States currency, or when any proceeds in foreign currencies or credits shall be reduced to United States currency, be covered into the Treasury as miscellaneous receipts.

* * *

MISCELLANEOUS PROVISIONS

SEC. 404. (a) The President may prescribe such policies, not inconsistent with the provisions of this title, as he shall deem necessary to effectuate the provisions of this title, which provisions shall guide each executive agency in carrying out its functions hereunder.

(b) Any authority conferred upon any executive agency or the head thereof by the provisions of this title may be delegated, and successive redelegation thereof may be authorized, by such head to any official in such agency or to the head of any other executive agency.

(c) The head of each executive agency responsible for the disposal of foreign excess property hereunder may, as may be necessary to carry out his functions under this title, (1) subject to the civil-service and classification laws, appoint and fix the compensation of personnel, and (2) without regard to the civil-service and classification laws, appoint and fix the compensation of personnel outside the continental limits of the United States.

* * *

TITLE V—GENERAL PROVISIONS

APPLICABILITY OF EXISTING PROCEDURES

SEC. 501. All policies, procedures, and directives prescribed . . .
in effect upon the effective date of this Act and not inconsistent herewith, shall remain in full force and effect unless and until superseded, or except as they may be amended, under the authority of this Act or under other appropriate authority.

REPEAL AND SAVING PROVISIONS

SEC. 502. (a) There are hereby repealed—

(1) the Surplus Property Act of 1944, as amended (except sections 13 (d), 13 (g), 13 (h), 28, and 32 (b) (2)), and sections 501 and 502 of Reorganization Plan Numbered 1 of 1947.

* * *

AUTHORIZATIONS FOR APPROPRIATIONS AND TRANSFER AUTHORITY

SEC. 503. (a) There are hereby authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

(b) When authorized by the Director of the Bureau of the Budget, any Federal agency may use, for the disposition of property under this Act, and for its care and handling pending such disposition, any funds heretofore or hereafter appropriated, allocated, or available to it for purposes similar to those provided for in sections 201, 202, 203, and 205 of this Act.

SEPARABILITY

SEC. 504. If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of this Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

EFFECTIVE DATE

SEC. 505. This Act shall become effective on July 1, 1949, except that the provisions of section 502 (a) (2) (repealing prior law relating to the disposition of the affairs of the War Assets Administration) shall become effective on June 30, 1949.

Approved June 30, 1949.